

Irta Central Library

PILANI (Jaipur State)

Class No :- 331

Book No :- F 53 U

Accession No :- 31914

McGRAW-HILL INDUSTRIAL ORGANIZATION
AND MANAGEMENT SERIES

L. C. MORROW, *Consulting Editor*



Understanding Labor

*The quality of the materials used in
the manufacture of this book is gov-
erned by continued postwar shortages.*

McGRAW-HILL
INDUSTRIAL ORGANIZATION AND MANAGEMENT SERIES

L. C. MORROW, Consulting Editor
Editor, Factory Management and Maintenance

The program of this series has been outlined by the following advisory committee:

CHARLES WILLIAM BEEBE, Professor and Head of Department of General Engineering, Purdue University	GLENN GARDINER, Vice President, Forstmann Woolen Company
HAROLD V. COBS, Vice President, Ford, Bacon & Davis	JAMES W. IRWIN, Management Counsel
ALVIN E. DODD, President, The American Management Assn.	THOMAS ROY JONES, President, American Type Founders, Inc.
H. P. DUTTON, Chairman, Department of Business Economics and Industrial Engineering and Dean, Evening Division, School of Engineering, Illinois Institute of Technology	FRED A. KRAFFT, Director of Industrial Relations, American Viscose Corporation
	HERMAN W. STEINKRAUS, President and General Manager, Bridgeport Brass Co.

(Books already published or in production)

- BENSON**—*Using Music and Sound Systems in Industry*
BETHEL, ATWATER, SMITH and STACKMAN—*Industrial Organization and Management*
BIKLEN and BRETH—*The Successful Employee Publication*
BRIDGES—*Job Placement of the Physically Handicapped*
CANTOR—*Employee Counseling*
ELLS—*Salary and Wage Administration*
EVANS—*A Program for Personnel Administration*
FERN—*Training for Supervision in Industry*
FITZPATRICK—*Understanding Labor*
GARDINER—*When Foreman and Steward Bargain*
GRANT—*Statistical Quality Control*
HANNAFORD—*Conference Leadership in Business and Industry*
HILL and HOOK—*Management at the Bargaining Table*
KALSEM—*Practical Supervision*
LINCOLN—*Lincoln's Incentive System*
MORGAN—*Industrial Training and Testing*
NEUSCHEL and JOHNSON—*How to Take Physical Inventory*
PRESGRAVE—*The Dynamics of Time Study*
SMYTH and MURPHY—*Job Evaluation and Employee Rating*
STOWERS—*Management Can Be Human*
WIREN and HEYEL—*Practical Management Research*

(Other titles in preparation)

Understanding Labor

BY

BERNARD H. FITZPATRICK, A.B., LL.B.

*Member of New York Bar; Industrial Relations Director,
Commerce and Industry Association of New York, Inc.*

First Edition

SECOND IMPRESSION

New York

London

McGRAW-HILL BOOK COMPANY, INC.

1945

UNDERSTANDING LABOR

COPYRIGHT, 1945, BY THE
MCGRAW-HILL BOOK COMPANY, INC.

PRINTED IN THE UNITED STATES OF AMERICA

*All rights reserved. This book, or
parts thereof, may not be reproduced
in any form without permission of
the publishers.*

THE MAPLE PRESS COMPANY, YORK, PA.

To

MY WIFE AND CHILDREN

WHO HAVE FOREGONE MANY PLEASURES THAT

THIS BOOK MIGHT BE WRITTEN

ERROR EST NON MINUS VETUS QUAM PESTILENS
QUO MULTI MORTALES . . . PERSUADENT SIBI
. . . JUSTUM ATQUE INJUSTUM NON SUAPTE
NATURA SED HOMINUM INANI QUADAM OPINIONE
ATQUE CONSUECUDINE DISTINGUI

FREEDOM OF THE SEAS.

PREFACE

This book is intended to be one of suggestion, not of definition. It is really the author's effort to explain to his own satisfaction the labor phenomena which have come to his notice in the course of his dealings with the practicalities of industrial relations.

Quite fortunately, the author has been able to observe labor from many different viewpoints. He has represented unions of various affiliations, acted as arbitrator and as consultant to arbitrators, lectured to union men and to employers, and has represented and been adviser to management interests in labor relations and personnel administration matters. Despite this variety of viewpoints, or perhaps because of it, he was continually in a puzzled state of mind about labor. Much that went on failed to make sense. Explanations by those involved only deepened the mental muddle; the very language of explanation was "double talk."

In addition to this state of mental fog, some important practical questions appeared. "Why had the Wagner Act increased labor strife instead of diminishing it, as Congress had hoped?" "Why was the Railway Labor Act successful while the Wagner Act failed?" "Why had the C.I.O. succeeded as an industrial organization when others had not succeeded?"

In this book the author has tried to set down some ideas which, in the first place, if they do not enable him to dispel the bewilderment, at least furnish a rational explanation of why the bewilderment exists, and, in the second place, tend to supply answers to the questions. The ideas center around these main points:

1. An appreciation of the differences between casual labor and tenure labor.
2. A recognition of the monopoly characteristics of the traditional union forms: casual craft, tenure craft, and extrovert industrial.
3. A recognition of the novelty of the introvert industrial union form made possible by the Railway Labor Act, the Wagner Act, and their derivatives.
4. A recognition of the incompatibility of the institutions proper to traditional union forms with the new introvert form.

A realization of these points and their results makes clear to the author much that has been obscure. In the hope that the presentation of these points will do the same for others whose minds, like the author's, have been groping for light, this book is presented.

No remedies for the very evident evils which beset industrial relations have been suggested, except where the suggestion of a possible remedy would aid the understanding. This failure to suggest remedies is justified; for until there is a more general understanding of the shape of labor institutions, remedial measures would meet with scant acceptance. When the general understanding comes, the remedies will follow.

Errors or lack of clarity in the book may be attributed solely to the author. His experiences in the field of industrial relations have been almost exclusively on the practical work-a-day side, and he finds it extremely difficult to write upon a generalized and theoretical plane. Therefore, the author anticipates that those better versed in theory than he, will find much to criticize. He will not complain, however, if through his own errors, truth is made plain.

The author owes a deep debt of gratitude to three men who, although they have not directly contributed to this work, have by their broadminded encouragement of his

general industrial relations work, led him to persist in its writing. They are Major William J. Bell, his former law partner, Rev. Philip A. Carey, S. J. of the Xavier School of Social Order, New York, and Mr. Thomas Jefferson Miley, Secretary of the Commerce and Industry Association of New York, Inc.

B. H. FITZPATRICK.

NEW YORK, N. Y.,
January 30, 1945.

CONTENTS

	Page
PREFACE	vii
CHAPTER	
I. INTRODUCTION.	1
Antiquity of labor troubles—rooted in human dignity—employer's personality—human dig- nity a norm of good practical labor relations— unfair labor practices—labor pampering— labor trouble and economic conditions— wealth distribution of minor importance— falsity of "squirrel cage" argument—proper wages—understanding of contemporary con- ditions.	
II. A LOOK BACKWARD.	11
Doctrine of conspiracy explained. Doctrine of right to pursue lawful vocation—base of doctrine—dynamic quality—possible modifi- cation of idea of ownership as applied to a business. Doctrine of restraints on trade— protection of free markets—falsity of "lawful for one, lawful for many" idea—"free labor market" theory—justification of labor unions in free economy.	
III. CRAFT, INDUSTRIAL, AND HETEROGENEOUS UNIONS.	27
Heterogeneous unions—Knights of Labor. Craft unions—A.F. of L. Industrial unions —C.I.O.—two meanings of term "industrial union." Tenacity of "one big union" idea— repeal of Wagner Act necessary to accomplish "undivided house."	

IV. ORGANIZATIONAL DIFFERENCES—CASUAL AND
TENURE LABOR. 34

Unions in casual field—the monopoly principle—dualism—working non-union—emphasis on wages, hours, stints—trade jurisdiction—craftwise division of employers—minor role of employers—casuals and property rights in business—industrial unions among casuals. Unions in tenure field—craft unions and industrial unions—unions principal and unions representative—one-plan' unions, federation and affiliation—chronological change in meaning of "closed shop," "open shop." Distinction between casual labor and tenure labor.

V. MONOPOLY UNIONS. 49

The skill-monopoly principle—characteristics—dualism—territorial jurisdiction—intolerance of non-union shops and non-union men—duress-consent vs. free consent—negation of majority rule—evils of monopoly system—"The Craft" as a body corporate—"union-principal" contracts—"contract stability"—"union responsibility"—the "fungible craftsman."

VI. THE RAILWAY LABOR ACT 66

The elective principle—destruction of craft unionism—craft bargaining units—elective principle vs. the closed shop.

VII. THE CORPORATE STATE 82

Paradox of right of choice in a corporate society—concordance of monopoly principle with corporatism—misconception of class society underlying labor clause of N.I.R.A.—intended results—corporate tendencies in

some industries—effects of N.I.R.A., evolution of majority rule—explanation of organizational surge under Wagner Act—the introvert industrial union vs. the extrovert industrial union—introversion fatal to the corporate state—remarks on interpretation of “*Quadragesimo Anno*”—labor aspects of corporatism.

VIII. THE WAGNER ACT GENERALLY CONSIDERED . . . 99

Administrative defect flowing from adoption of Federal Trade Commission procedure—private remedies for private rights—Traditional notion of “Collective Bargaining” vs. the notion of employee rights.

IX. THE WAGNER ACT—THE AFFIRMATIVE ASPECT 107

Procedural errors of N.L.R.B.—confusion of historical and modern senses of “question or controversy”—results—the right to remain unorganized—the affirmative procedure—minimization of the employee—results, the “Battle of Montgomery Ward’s”—impossible task of N.L.R.B.—real rights of employer—extrovert unionism on introvert base. Retrospective vs. current enforcement of bargaining rights—one-sidedness of bargaining enforcement.

X. THE WAGNER ACT—BARGAINING UNITS . . . 128

Muddled concepts of Act—multiple-employer units, historical and unitary working force theories—tendency towards introversion—subdivisional units—employee unit selection.

XI. THE WAGNER ACT—THE NEGATIVE ASPECT . 134

The company union and the company-dominated union—organic and inorganic domina-

tion—disestablishment in inorganic cases. Direct communication between employer and employees.

XII. THE CLOSED SHOP AND RELATED ARRANGEMENTS 142

Impact of Wagner Act on traditional union types—destruction of fundamental concept of closed shop. The closed shop and the introvert form—"industry-wide bargaining" the unexpressed predicate of much closed shop thinking—limitations of the introvert form—falsity of the financial argument, "service charge shop"—falsity of union security argument, union shop phase—closed shop phase, preferential shop and the "right to work"—falsity of "better relationship" argument and the "responsibility" argument.

XIII. INTROVERT INDUSTRIAL UNIONS 168

Characteristics of introvert unions—interplant vs. intraplant wage criteria—the "non-fungible man"—profit sharing. Union responsibility vs. employee responsibility—union substitution. Effect of introversion on union structure. Minute regulation of intraplant conditions. Elasticity in meeting situations in individual companies. Place of introvert unions in American life. Can extroversion and introversion be harmonized?

APPENDICES

A. TABULAR STATEMENT I—SOME CHARACTERISTICS OF UNION TYPES 178

B. TABULAR STATEMENT II—THE CLOSED SHOP AND RELATED ARRANGEMENTS 179

CHAPTER I

INTRODUCTION

Labor troubles are as old as civilization itself. In greater or less degree, they have existed in all civilized societies. The forms which labor troubles have taken have changed from time to time and from civilization to civilization, which might be expected, because labor troubles are generated in the attempt of the laborer and his employer to adjust themselves to social conditions. Social conditions are dynamic, and not static; customs and habits of thought change; social institutions arise and disappear; invention and discovery produce alterations in modes of life, and to each change the laborer and the employer must adjust himself. Only in a stagnant society can labor peace be relatively assured.

We find the Israelites in Egypt complaining of having to make bricks without straw. We find Spartacus and his gladiators rising in revolt over their conditions of labor. We find, in modern times, a Federal Baseball League formed, largely, because of oppressive contract conditions enforced against baseball players in the National and American Leagues. Nowhere do we find an organized society without finding labor troubles—except among dumb animals.

There are two observations to be made concerning this state of affairs. The first is that labor troubles exist because men are men and not ants or bees; because men have intellect and will; because they have a personality which demands respect. A perfect society from the labor viewpoint could exist, but it would not be a human society.

This first observation has a significance not only to the scientist and the metaphysician; it has a practical importance which can scarcely be overestimated, because

of its utility in solving some present-day labor problems. A short digression to some examples, which will vitalize the rather abstract idea of the importance of human personality in labor, will be worth while.

The great Pullman strike of 1894 furnishes one example. The Pullman Company was a company not wholly lacking in concern for its employees—in a paternalistic fashion; it had built for them an industrial village which was, for the times, a model one, and it provided, according to the standards of the times, many other advantages for them. It paid wages which were “ample and satisfactory.” In the 1893 depression, however, it cut wages without consulting the employees. Now the strike did not follow upon the wage cut; the employees worked under the reduced scale from September, 1893, to May, 1894. How extreme was the hardship during this period may be seen from the fact that some pay checks, after rent deductions, were as little as two cents; but even under these conditions there was no strike. In May, 1894, a committee was sent to George Pullman, who was rather adamant on the wage scale but promised to investigate certain shop abuses. Still there was no strike. But on May 10, three of the committee were discharged, and those discharges were the spark that touched off a conflagration, the proportions of which are now historic.

Note that it was not the wage scale that caused the strike; the U.S. Strike Commission found that a “slight concession,” not in wages, but in rents, would probably have averted the strike. What did cause the strike was the disregard for the human personality involved in the act of discharging the committee. It was not merely that the avenue of relief from economic hardship had been closed; it was that the employees had been regarded as dumb brutes, without intellect and will, to be moved about as the chattels of the Pullman Company just as it moved rolling stock.

It may be remarked that disregard by the employees

of the human personality of the employer is frequently a source of labor trouble. Very often an employer takes an understandable pleasure in slamming the door in the face of overbearing labor leaders.

Often a labor relations picture will change almost overnight, from one of acrimony to one of harmony, when the idea of respecting the personalities of his employees dawns upon an employer. One such incident is worth telling. The members of a Federal Local of the American Federation of Labor who were engaged in a manual delivery service requiring continuous carrying and manipulation of heavy loads complained that, after the execution of each collective contract with a certain employer, the employer would institute a speed-up which would absorb the pay increases granted by the contract. Some three years before the incident narrated, they had consulted counsel with a view toward preventing the speed-up and had been advised that there was a good possibility of litigating the issue successfully, since a pronounced speed-up would probably be held to be a breach of contract. For reasons not here germane, counsel's advice was disregarded. But now there was a renewal contract and a new speed-up; and an argument to a court that the speed-up was a breach of their contract would sound somewhat hollow in the face of the unchallenged speed-up under the old contract. At this point counsel could not safely advise litigation, but did advise that perhaps the threat of loss of his contract at a time of rising wages might impress the employer and therefore had the union administration instruct an intelligent rank and file member to present at the next meeting a motion that counsel be retained to advise whether the speed-up was violation of the contract so that the men might break the contract and obtain higher wages reflecting the rise in the cost of living. The officers were instructed to see, in a quiet way, that the motion passed, but at the same time (in order to leave the door open for the approach of the employer) to oppose the motion when

it was made on the ground that they did not wish to use technicalities to avoid a contract. Since, as the initiate know, there is a "stooge" at every union meeting who reports to the employer, no steps were taken to bring the motion to the attention of the employer. Two days after the motion had been passed as planned, the employer called the union president into his office and started to discuss the realignment of delivery schedules to eliminate what he called "inequities," and arrangements were made for a union committee to thrash out the rather technical matter with him. The original plan of campaign had called for procuring a supplemental agreement to the contract freezing delivery schedules within reasonable limits. However, the union committee, after working with the employer for six weeks and settling the schedules, stated that, if there were no strong legal reason why a supplemental agreement should be signed, they would prefer to omit it, because there was such good feeling between the union and the employer that they hesitated to disturb it by insisting on a signed agreement.

What had happened was simply that the employer had come to realize that all that the men really wanted was to be consulted about their schedules rather than be told by a foreman with a stop watch that their schedules must conform to his figures. After the elimination of some minor inequalities, the men were quite content to accept schedules not materially different from the so-called "speed-up" schedules. Oddly enough, after the accord with the employer, an unplanned voluntary speed-up took place which actually gave the employer more than he could have hoped for by an enforced speed-up.

Proof of this character might be adduced indefinitely in support of the thesis that the basis of all sound labor relations is the recognition of the human personality of the employee and the employer. What conforms to this norm is good, from the practical viewpoint; what traverses the dignity of the human being is bad.

Among the practices which traverse the dignity of the employee are those which we call unfair labor practices. Employers should remember that one who commits an act which his employees deem to be an unfair labor practice (the technical judgment of Labor Boards on this point is, as a practical matter, of little importance) is headed straight for labor trouble. If the Wagner Act and other such statutes were repealed tomorrow, the enlightened self-interest of the employer would still dictate obedience to its spirit.

This does not mean that labor should be pampered. An employer who pampers labor is not only building a house of cards which will topple about him in economic stresses; he is guilty of the unsocial conduct involved in setting standards which the bulk of the industry is unable reasonably to meet and which result in torsions damaging both to labor and to capital. Capital should insist on its fair return; it should insist on a fair day's work; it should insist on retaining its managerial functions; it should insist on substantial compliance with contractual obligations. It should be bold enough to suspend operations rather than pay wages which the produce of the industry will not sustain. In doing these things, however, it must respect the personality of its employees; it must treat them as reasonable beings to be convinced and not brutes to be coerced.

Before passing on to the next point, it may be well to counter an idea which is common at the present time—the idea that labor troubles are rooted in money as such. Leftists, on the one hand, conceive that labor troubles are the outgrowth of the economic struggle and will disappear when the state takes over and distributes the national income “equitably.” Some industry men, on the other hand, think that the answer to all labor troubles is to be found in wage increases, large incentive bonuses and the like. At bottom, both envision man as responsive chiefly to economic stimuli. They think of the “economic man.”

Questions of the distribution of wealth, the setting of wages, the leveling of classes (downward by the Leftist doctrine, upward by the industrialist doctrine) obsess them. Their estimate of man starts with and ends with his belly.

Wages are important. The precise level of wages is not, however, quite as important as many think. What counts far more than the question of \$20 or \$30 per week is the necessity of subordinating the details of living to an employer for any wage, however great. The executive in the five-figure salary class, if he works to earn a living, is on a level with the porter in the three-figure class because the employer has the right to insist on control of a certain number of the details of the daily life of each.

The labor problem is not strictly an economic problem, though it is a problem which is rooted in economic necessity and sometimes requires the use of the economists' tools. But basically it is a problem which is human—a problem of adjusting men to men, men to themselves, and men to matter. It arises out of and is conditioned by the necessity of subordinating the free will of one man to the free will of another.

A little thought along practical lines will make this point clear. Anyone who knows highly paid executives as a class will say that the happiness of any individual executive in a given post has a tendency to lessen as his necessity increases. If he is independently wealthy, or if he is assured of comparable employment elsewhere, he is likely to be happy in his job. On the other hand, if he is chained to his job by economic necessity, real or fancied, he is likely to be unhappy. Yet, with his five-figure salary, he is hardly in a position to complain of the maldistribution of wealth.

Again, shipbuilding and aircraft manufacture lead the field in absenteeism. They also lead the field in wages, which indicates that there is a saturation point beyond which, if wages are increased, they exceed the desires of

employees. Employers of southern Negroes are wary of increasing wages because the desires of that class of help are, as the result of regrettable history, very easily exceeded, and a marked increase in earnings is generally followed by a marked increase in absenteeism.

Further illustration of the point exists in the case of three companies in the same city in the same line of business. The high-paying company has trouble, the low-paying company has trouble, but in the intermediate company all is serene. Unions have organized the high payer and the low payer, but have not made a dent in the intermediate company. (Unions do not generally create labor trouble; more often the trouble exists before the union appears, and the union simply builds upon it.) The high-paying company, incidentally, had made a fetish of employee welfare in a paternalistic fashion, granting pensions, promoting insurance schemes, and the like.

Some genius may someday give us a foolproof formula for the distribution of wealth. From the viewpoint of labor relations the accomplishment would have a distinctly minor significance. There would still exist the root of the problem, the subordination of the will of one man to the will of another in order to earn that just share. The problem would be with us even if we adopted the corporate form of economy or the Marxist form or outright slavery or any other form that the imagination could conjure up.

As a corollary to this observation it should be noted that an argument currently made against collective bargaining as an institution is unsound. The argument is that if the unions could succeed in organizing all employees in the country so that all would receive increased wages, the increases would have to be added to the selling price of goods; and the increases in price would produce an increase in the cost of living which would almost precisely cancel out the increased wages. Assuming that this squirrel-cage argument is logical (and there seems to be substance behind it), it proceeds on the false assumption that the labor

problem is an economic problem. A fairly cogent argument may be made to the effect that unionization results in a long-term net economic loss to the laborer, whatever short-term advantages he may enjoy. Even if the argument is true and every working man is entirely convinced of it, we will still have the labor problem and we will still have unions.

The foregoing discussion should not lead us to lose sight of the importance of proper wages. Particularly in certain trades such as building construction and stevedoring, the wage is almost the sole concern of the worker and of his union and of the employer, as we shall later see in detail. Indeed, the discussion serves to point up the importance of proper wages by transferring the emphasis from questions of maldistribution of wealth to questions of reasonable living standards, recognition of the worth of the work done and of the individual who did it.

We turn now to the second observation upon the phenomenon that labor trouble is consequent upon social and economic change. The observation is that, to understand the status of labor at a given place and time, one must consider not only the institutions and laws that may properly be called labor institutions and labor laws but must also consider the social and economic background into which those laws fit. It is impossible, for instance, to understand what the institution of serfdom or villenage was without understanding the feudal system as a whole.

This is vital to the proper estimation of much of our current literature on labor and, more important, for an insight into the somewhat chaotic labor structure of today. Many writers of the so-called "liberal school," most labor leaders, and, of late, even businessmen have referred to the oppressiveness of such things as the Statutes of Laborers in England and the doctrine of criminal conspiracy which outlawed labor unions as such. Now unquestionably those laws were at times oppressive, but unquestionably at other times those laws could not be considered oppressive.

The Statutes of Laborers were laws prescribing the wages of labor, sometimes themselves fixing the rates, at other times authorizing justices to fix the rates. If the wage rates were reasonably fixed, such laws, although wrong-headed because they neglected the workingman's personality, could hardly be called oppressive. These laws operated, however, not in a free economy where prices varied greatly, but in a regulated economy where the prices of many essential commodities were also regulated. If hardship resulted to the employee, the wages could be altered to eliminate it; if hardship resulted to the employer, the government sometimes went so far as to require his customers to purchase their normal quota of goods from him at a fixed price. While a laborer was regarded somewhat in the light of a public utility whose services could be commandeered by any employer willing to pay the statutory rate, the laborer out of work could in turn at times commandeer a job even if the employer had no need for his services. The laborer, too, was given a measure of social security by prohibitions upon discharge, and the guaranteed annual wage, now so prominent in union contract demands, actually was the law of England some centuries ago.

To make an absolutely accurate estimate of the oppressiveness of these labor laws, one would have to have lived at the time they were in operation and observed the whole economy in operation. In 1939, in this country, a great many people reading the foregoing summary would have thought such labor laws oppressive; but in 1945 we have a very close approach to those conditions in our war economy, and few think them oppressive. Commandeering of services is effected under a "work or fight" program; wages are fixed by a War Labor Board and a Presidential ceiling order; prices are held down by a Price Administration; employees cannot "shop" for better pay; employers may not discharge at will.

In England, the original and sole purpose of labor unions

was to raise wages. Since the law itself regulated the wages, a combination to raise them above the legal price was a conspiracy to violate a law and was hence an unlawful conspiracy. Thus a trade union was unlawful, because its purpose was to commit a crime. However we may have regarded such a doctrine from the standpoint of our peacetime economy, when employees today strike in disappointment over a wage scale set by our War Labor Board we incline to regard the strike as criminal because it is a violation of a wage-fixing law. The reason that unions themselves are not outlawed today is that the modern union has transcended the wage-fixing purpose of the Elizabethan union and has other and more important functions than mere wage fixing. History has repeated itself to confound so-called liberal thought.

This second observation has more than academic importance. Though few people realize it, there was a revolution in the field of labor when the Wagner Act was passed. The Act was revolutionary, not evolutionary; labor history came to a jarring stop and assumed an entirely new direction. The roots of the power of the major part of the old labor movement were entirely destroyed, and a new labor movement was created, drawing its power from a different source, catering to different human needs, and operating on entirely new principles. Nevertheless, writers and public officials go on using the terminology of the old labor movement, much of which has lost its original meaning. They pass laws and render decisions reflecting the old mores and ideals, attempting to perfect the old order of things after its foundations have been destroyed. The result can be nothing but confusion—mental, legal, and industrial.

CHAPTER II

A LOOK BACKWARD

The labor history of the United States begins in England, as does most significant history of the United States. Our labor history is more significant in what we did not import from England than in what we did import.

There were three main currents of thought developed in English law which we must consider in their bearing on labor law.

1. The doctrine of conspiracy.
2. The doctrine that interference with the operation of a business or a lawful calling is a deprivation of property.
3. The doctrine of restraints on trade.

The doctrine of conspiracy, which, in England, stood in the way of labor organization until the nineteenth century, never struck real root in America. The reasoning of this doctrine was that trade unions were organized to raise wages; but, since wages were fixed by law, raising wages was unlawful; therefore, trade unions were unlawful. They were a conspiracy to accomplish an unlawful end; so that whatever means they used—strike, picketing, boycott, mere abstention from applying for work—however innocent in itself, was vicious because it was done to break the law.

In this country, however, until the present war, nothing comparable to the Statutes of Laborers existed. Therefore, we could combine to raise wages and strike, picket, boycott, or abstain from accepting employment to force wages up. Only if the means used were criminal could crime be committed in forming or assisting unions. A simple strike was not criminal; a strike involving destruction of property was.

Such, with few exceptions, has been the law in the United

States. There is only one court opinion that certainly follows the English rule, although several others, in which the point was not squarely raised, incline to that view. Any lawyer of the present day, knowing the tendency of the courts, especially the lower courts, to follow a rule blindly must regard this as an admirable record of insight on the part of the American bench. It was so easy to say, "We follow the English law generally and the English law makes a trade union criminal; therefore we hold a trade union to be criminal."

The American bench was discriminating enough to see that behind the notion that a trade union was a conspiracy were the wage-stabilization laws, the Statutes of Laborers. The Statutes of Laborers had never been regarded as being in force in this country. Economic conditions had built up a free-price labor system here. Since there were no wage-fixing laws, there was no conspiracy, and trade unions could have a legal existence. The doctrine that a trade union was a conspiracy has had, therefore, no substantial effect on American labor, although labor has run afoul of other types of conspiracy.

The doctrine that interference with the operation of a business or with the pursuit of a lawful calling is a deprivation of property (which has its roots in English law) underlies a great deal of our present law. No attempt will here be made to describe the doctrine in detail or to observe its limits, beyond stating that it applies as well to the right of an employee to work as to the right of an employer to vend his product and that it is, at least in its more certain applications, constitutionally protected.

No attempt is made to define the doctrine because it is most complex at best and deals with the ever-shifting phenomena of economic life which make new definitions necessary before the ink is dry on the old. The legal expounders of the doctrine, too, have had the misfortune to use such terms as "malice" in defining the doctrine, which has resulted in endless confusion because a term of

that character means several different things. This shifting and uncertainty marks the doctrine even outside the labor field; the trademark and unfair competition laws alike feel its effect.

Unfortunate as this legal shifting may be for the student of that law, for the general good of society it is fortunate. The shifting shows that the law is following life rather than setting arbitrary patterns of conduct to which men must conform.

It is, indeed, to the dynamic quality in this branch of the law that we may look for the ultimate solution of much that is troublesome in labor. It will be convenient, for the purpose of seeing how this may come about, to consider some of the moral and legal questions arising out of the sit-down strike. When the wave of sit-down strikes swept the country there was a great deal of discussion of these questions, chiefly hinging upon the question of the property rights involved. Employers pointed to the violation of their right of property in the plant and machinery and compared the seizure to larceny; employee spokesmen argued that a deprivation of the use of property is not an invasion of a property right and even asserted a property right in the employees as respects plant and machinery, backed up by theories too fantastic to merit consideration.

It is quite clear that there is nothing inherently immoral in the sit-down technique. True, as the employers claimed, it was a deprivation of the use of property and hence they were deprived of property; true also it is that the employees had no property in plant and machinery. But law and morals alike in analogous cases sanction many deprivations of property. When a garage man asserts a lien on an automobile for repairs or storage charges, he confiscates the automobile which is the property of the owner and retains it until his bill is paid. He has seized the property of another to enforce a property right of his own.

How can there be then a moral question when employees seize a plant, provided they do no permanent damage,

to enforce their equal property right in the business, their legally recognized property right to a collective contract? Are they not merely doing in an effective way what the law permits them to do by striking or boycotting—*viz.*, cause a stoppage of the productive process? If there is a clear invasion of their own right, may they not, in sound morals, seize a plant which, if operated at all, must be operated in an illegal attempt to deprive them of their right? Have they not something comparable to a lien on the plant and machinery to the extent necessary to secure their own right when the plant and machinery can be rightfully put to no productive use?

It is equally clear that, however morally justifiable may be a sit-down strike, the law ought never permit it. In a matter so important to the employer and involving issues not always clear, a party who feels himself aggrieved cannot be permitted to become the judge in his own cause and deprive the employer, perhaps wrongfully, of his property in the plant and machinery, to say nothing of his property right in the continuance of the productive process. The likelihood of violence and damage should also restrain the law from approving the sit-down technique. If such judgments are to be made, the law itself should make them and enforce them by such means as injunction and receivership.

Speculations of this kind lead to the thought that employees have, at the present time, at least a qualified property right, not in the plant and machinery nor in the capital invested but in the business conceived of as a "going venture," a property right in the productive process as such. Such a property right, in the dynamic state of the law mentioned above, may be capable of development to serve the common interests of employer, employee, and consumer.

In time, perhaps the labor field will come to be dominated by the idea of a business "venture" (using that term in a sense akin to its use in maritime law, where it expresses

the community of interest of shipowner, charterer, shipper, crew, and bottomry and respondentia interests) in which both employer and employees have common interests in the nature of property rights to a much greater extent than is true today. The precise limits of such a doctrine would, of course, have to be established by piecemeal adjudication; but its general shape would result from a recognition that industry exists to serve not the employer alone nor the employee alone nor the public alone, but all three. This does not necessarily mean a sharing of profit and loss, nor yet that employees should be shareholders: it may mean, however, that there shall be recognized a limited right on the part of labor to participate in the management of the enterprise even to the extent of having a voice in the setting of sales policies, the expansion and contraction of production, and related matters.

This speculation is, perhaps, open to attack on the ground that it is founded upon an extremist measure, the sit-down strike. Take, then, a more prosaic example, the case of a nationally known business institution of the first quarter of this century. We shall cloak it with anonymity and call it "Doe Brothers." Over the lifetime of its founders and of their employees, Doe Brothers had been built up by toil and sweat from small beginnings to become the largest commercial enterprise of its kind in the world. Its founders had given their lives to it, and so had many of their executives, clerks, and workmen. They had served society well, and society had made them the leaders of the industry.

But when the last of the founders died, the property fell into the hands of two old ladies, who may have been charming in their way but who had no use for enterprise. The legatees promptly closed the plants and destroyed the enterprise. Their strictly legal property right permitted them to do this. The lifework of the employees was discarded and they were left stranded.

Perhaps the following argument is emotional, but the emotion seems founded on reason. Put yourself in

the shoes of an executive who had devoted his life to the business, say, the sales manager. Slowly, against daily discouragement, against keen competition, he had built up the distributing end of the business—creating a market among the consuming public, selling the retailer, holding the jobber—until it had become the greatest, smoothest distribution system in the world. Thousands of his personal contacts were in that system; the daily irritations of mistakes, of human “orneriness,” some sleepless nights, an occasional flash of imagination—all his, and all wrapped up in that system. The system and the product were inextricably interrelated. Without the product, the system could not move; without the system the product would not move. Yet two old ladies who had contributed nothing to that social organism called Doe Brothers, whose imaginations could not go beyond the surplus on the balance sheet and the social position it would enable them to maintain, who were blind to the supply lines from tropic jungle and mountain peak by land and sea to the factories, who saw in the factories only certain salable brick, stone, earth, and machinery, who saw in the distributing system only a means of bringing in money, of which they now had enough, who failed to see in it the living breath of its creators, the respectable livelihood of thousands of men, and the enjoyment of the product in thousands of homes—these two old ladies held that system in their hands and destroyed it.

Who had the moral right to that property? Did not the sales manager who built that distribution system have some moral right to it greater than the legal right of the old ladies to withdraw the capital? Did not even the plant janitor, who had spent his life providing a safe and sanitary factory and storehouse, have a greater moral right to the continuance of the business than the old ladies had to destroy it?

It would be difficult to answer these questions in the negative. The law, of course, presently answers the com-

parable legal questions in the negative, since it (quite properly) tends to uphold the older, more tangible forms of property. At present, it says that in such cases the right of ownership involves the right to destroy. But the law is not immutable, and of late years there has been growing a class of situations wherein the right to own does not include the right to destroy. Railroads and utilities, for instance, may not destroy their facilities at will; they must obtain leave of the public authorities to abandon lines or discontinue service, and in one abandonment case it has been held proper to give weight to the interests of the employees in deciding the question of abandonment. It may well be that the law will find a mode of developing a more refined concept of property which will go far toward solving many questions in the labor field.

Such a refinement should take greater account of the true nature of a business. A business is primarily people, people organized to serve other people—a living, dynamic thing. The organization generally extends beyond direct employees and embraces suppliers, agents, contract processors, jobbers, and many other classes of people having a more or less direct relationship to production, distribution, and service. Some of these people consider themselves independent of the business, others do not, but the fact is that the business is the sum total of these relationships; the plant and cash are secondary.

A good practical example of this occurs every time a stock insurance company is sold. The net worth of such a company is rather accurately fixed by its balance sheet, which is prepared to conform to the rather strict requirements of state insurance authorities. An insurance company, however, is almost always sold at a price substantially in excess—often by several million dollars—of its net worth as shown by the balance sheet. It stands to reason that the buyers are not giving away several million dollars; they are buying something with those extra dollars, and that something they call, technically, the “agency plant.”

What is the agency plant? Simply the sum total of the human contacts through which business flows to the company—people organized to serve other people. The purchasers, therefore, buy a lot of cash, stocks, and bonds (which they could buy elsewhere at about the same price) plus the agency plant—those human relationships which are really the business.

“Good will” is a term sometimes used by accountants in this connection, but the term is totally inadequate. To the ordinary lawyer it simply means that the seller of a business will not compete with the business which he sells. The trade-mark lawyer will conceive it as the probability that a certain number of customers will buy the product or service. The accountant will think of the sales ledger totals. None of them will see that it is a human, living thing—a social person.

If the law can fashion an adequate concept of property along these lines, it will have the effect of welding together the diverse interests of labor, management, and capital in each enterprise. It will still any tendency toward class warfare, for the best security of property rights is a wide dispersal of property. A nation whose family life is founded upon relative economic security resulting from diligent labor will be a nation with neither the time nor the inclination to destroy the property rights which give it root.

Thus, in the dynamic state of the legal doctrine that the carrying on of a business is a right of property may lie a factor of great importance to the future of labor. The doctrine is being molded by legislation, such as Labor Relations Acts granting limited property rights to labor in business ventures, as well as by collective contracts which tend to create such things as tenure of employment.

The doctrine of restraints upon trade is very old, going back to, and probably beyond, the Justinian Code. It has existed wherever a free market has existed, whether that free market was the English fair of simple economy

or the far-flung markets made possible by modern transport and communication.

The language used in ancient prohibitions upon restraints of trade is revealing as to the object of the doctrine—to maintain a free market. A forbidden practice was “fore-stalling,” which to the mind of those times meant meeting farmers on their way to the fair and buying up their produce to prevent it from breaking the price at the fair. “Regrating” or buying at low prices for later resale on the same market was also prohibited. “Engrossing” or, as we now would say, cornering the supply of a commodity was also forbidden.

Prohibitions against restraints upon trade also applied, and still apply, to the service which persons may render in trade. For example, a bootmaker, upon selling his business to another, would not be allowed to make a contract whereby he agreed never to practice his trade again. For the protection of the buyer of his business he could agree that he would not practice his trade within a limited area, such as the City of London, for a limited time, say, five years, depending on the circumstances of the business. But he could not agree not to follow his trade in, say, the British Isles nor for a period as long as ten years, because that would be an unreasonable restraint upon trade. Not only would such agreements prevent individuals from engaging in trade, thus harming the public in a negative way, but they would also enable an operator in the trade to monopolize it by driving out of it all the other competent men.

It will be seen from these facts that the general object of the doctrine prohibiting restraints upon trade was not the protection of any particular individual from harm but the protection of the general public, the consuming public, from the loss of a free market.

It should also be observed that many acts that an individual alone might do and be within the law become wrongful when done in combination or concert with others.

One farmer, alone, might decide to store his wheat rather than send it to market, but if he agreed with another to hold the wheat off the market that would be a contract in restraint of trade. Likewise, one might lawfully decide not to buy wheat, but if he agreed with another to withhold a buying order, then he would have made a contract in restraint of trade.

This last observation is important because of a specious argument often raised in labor matters. This argument begins and usually ends with a question which is supposed to be unanswerable: "Why may not many lawfully do in concert what any one may lawfully do alone?" Portions of the Clayton and Norris-LaGuardia Acts echo this argument by prohibiting courts from issuing injunctions in labor matters against acts done in concert which, if done singly, would be lawful.

Now there are special reasons why certain acts done in concert by employees should be permitted and even protected by the law—that cannot be challenged. But there is a perfect answer to the argument "lawful for one, therefore lawful for many." It is that concerted action is often essentially different from individual action. One may exercise his right to walk down Broadway freely as an individual and be nothing more than an individual walking down Broadway; but if he unites with others to walk down Broadway in concert, twelve abreast, he is not only an individual walking down Broadway—he is a traffic obstruction. Likewise, one may walk across the Brooklyn Bridge on a Sunday, keeping time to the tune of "Yankee Doodle" and be a harmless fellow; but if a thousand others walk with him in concert so as to set up a vibration in the bridge which will cause it to fall, he is a saboteur.

So concert or combination itself may very well make wrongful acts that would otherwise be perfectly lawful or even praiseworthy. Hence we find the Sherman Act outlawing "contracts, combinations or conspiracies"—all forms of concerted activity—"in restraint of trade,"

because concerted activity destroys a free market, while the same acts done individually do not destroy it. We find labor engaging in concerted activities—strikes, boycotts, and the like—precisely because the concert produces an effect which individual action could never produce.

The point of this observation is not that all concerted activity on the part of labor is improper but merely that the propriety of a concerted activity cannot be determined by looking at the individual actions which go to make it up; one must take into account the effect of the concert of action and realize that concert may make bad what in individuals may not be bad.

Before pushing on into the labor applications of the legal doctrine prohibiting restraints on trade, it will be well to observe that this doctrine is a very fundamental one in our economy. Labor itself recognized this fact when it gave its hearty support to the campaign for the passage of the Sherman Act. A free economy demands free markets, and markets are not free if there is a concert either of buyers or of sellers or of both.

The doctrine of a free market was sought to be applied to labor in two ways. In the first way it was argued that, since labor unions were combinations of men whose object was to control the price of labor, they destroyed a "free labor market." Unquestionably labor unions are designed to, and do in practice, destroy the ability of the employer to hire at what price he will and, also, the ability of the workingman to work for what price he will—both matters that deserve serious consideration.

The institution which underlies any free economy is the "mutually advantageous contract;" an exchange of goods or service which benefits both the buyer and the seller. If a customer buys an automobile, he receives the benefit of cheap and rapid transportation, while the dealer receives a profit; the one, therefore, is willing to buy and the other is willing to sell. If the price exceeds the value to the cus-

tomer of such transportation, he does not buy; if the price offered does not pay the dealer a profit, he does not sell.

If every contract involved a wholly willing buyer and a wholly willing seller, there would be no problem. In the great majority of contracts, however, at least one of the parties is subject to some degree of compulsion to buy or to sell. If the price of food be too high, a person cannot very well stop buying all food until the price returns to normal, nor can a greengrocer retain perishable vegetables until he can get a price that will leave him with a profit. The willing buyer and the willing seller are frequently supplanted by the necessitous buyer and the necessitous seller, the degree of necessity, of course, varying considerably from case to case.

There are large classes of contracts, which we may call "distress contracts," in which the balance of power in the market is so strongly and so often on one side that society is obliged to take some measures to restrict individual freedom. Distress contracts embrace such things as contracts for electric light and power, illuminating gas, and telephone service. In such contracts, the seller has a monopoly in a limited area and can dictate his own price. These we find regulated by the state as to price and conditions of service. Mortgage-lien contracts are distress contracts because the position of the borrower is necessitous in the usual case. To regulate these, society has invented foreclosure proceedings and antiusury laws.

By and large, labor contracts have been in the recent past, if made individually, distress contracts, the scales being weighted heavily in favor of the employer. This is so because the laborer must live and hence must accept employment, while dollars, having no stomachs, need not employ men. Capital, to a great degree, has the choice of not operating when a profit cannot be made, and so it can outwait the laborer, who in most cases must work. Capital will in most cases employ only when it can make a profit out of labor; labor must work, however small be the return.

The more highly organized a society becomes, the more unevenly balanced become the scales. In an agricultural country such as the United States in the earlier half of the last century, even the laborer had a measure of independence because he, being himself close to the soil, could with slight difficulty supply his simple requirements such as food and fuel without a great deal of money. Today his fuel must come from Pennsylvania; he can no longer cut wood within easy carriage of his home. His potatoes must come from Maine or Idaho instead of from his back yard. He can no longer light his home with homemade tallow dips nor be clothed by a spinning wheel. In short, he has become a creature dependent upon others for almost every item essential to life, and this aid he must buy with money. Therefore, as the society becomes complex, he becomes less and less the "willing seller" of his labor and capital gains more and more power to reduce his return.

Another factor which weighs on the side of the employer is the increasing specialization of jobs in industry. A class of work which, some years ago, required an artisan familiar with all phases of the manufacture of an article, is done today in mass production by a group in which each person has the ability to perform a single simple element of the manufacture. An authentic Chippendale piece was the result of the long training and superior all-round skill of one or two artisans; its modern reproduction is the child of many workmen, none of whom need be able, alone, to reproduce the original. Fine carving in other years was done by a master craftsman; today a man who has very little of the craftsman about him will turn out ten like carvings at once by simply going over the original with the tracing point of a gang carving machine. By breaking up crafts and producing a series of single simple operations, industry can go to the unskilled to fill all but a small part of its requirements, and the "labor market" suffers a decline.

The "free market" in labor does not, therefore, except in

unusual circumstances, exist for the laboring man. What freedom there is, is freedom for the employer. There may be freedom of contract in a technical legal sense but not in any real sense, because the choice of the employee is either to accept the terms offered or to starve.

Against this background we must judge the labor union. A labor union, as such, is not a combination in restraint of trade; but it is a combination in restraint of the so-called "free labor market." If that labor market were actually free, so that fair terms rather than distress terms might be secured by the laborer, we might justly criticize a combination which restrained that market for the same reason that we criticize a combination of capital to control a market in goods. If that freedom existed the individual laborer could also command the respect due to his personality.

But real freedom on the part of labor does not exist, as we have seen. Since there is no "free labor market" in practice we cannot condemn labor unions as combinations restraining freedom in that market. Rather we see that combinations of labor, acting openly, tend to recreate a free market because they balance the power of the employer in that market by a power tending to equality with the power of the employer.

It is natural to inquire whether the power of combination in labor unions is not so overwhelming that employers are unfairly placed with reference to the procurement of labor. The answer is that in individual cases this is so, but generally speaking it is not so. The test of the relative economic strength of the employer and the union is not the size or the wealth of either, although both these factors play a part; the test is the length of time either can exist without the other and this varies from employer to employer and from union to union. The net result is a fair approximation of open market conditions in which the accidents upon which the bargaining strength or weakness of particular parties depends vary from bidder to bidder and from offerer to offerer. So long as unions confine themselves to the economic field, there is little to be feared from combi-

nation. In the political field, where unions may acquire legislative powers, combination may be a genuine danger, but that is something that cannot be considered here.

Such, in brief, is the justification for labor unions in a free economy. With unimportant lower court exceptions, that has been the law in the United States from the beginning. In England, as we have seen, a regulated economy banned labor unions while in this country a free economy permitted them. The apparent anomaly of combination in a free economy is merely apparent; it is not real. Therefore, the sporadic attempts made to outlaw labor unions as such failed.

It must not be concluded from this argument that the question of unionism is integral with the question of wealth distribution. Even the most just solution of that question will, as we have remarked, leave the labor problem unsolved so long as man must labor to obtain his just share. The argument is intended to explain how an apparent restraint is consistent with a free economy.

The second way in which the doctrine of restraints upon trade was sought to be applied to labor involved not the existence of labor unions as such, but certain activities of labor unions, notably the boycott. When a labor union goes beyond the simple step of depriving an employer of his labor supply and undertakes, by boycott or sympathetic strikes or physical violence, to prevent the goods of the employer from reaching their normal market, it is obviously restraining trade. Since, in these tactics, there is always a concert of action, there is a "combination or conspiracy in restraint of trade."

When the Sherman Antitrust Act was passed by Congress, that body did not exclude from the operation of the law those restraints which labor unions might seek to place upon trade. In the *Danbury Hatters'* case, the Supreme Court very properly held that it was not authorized to distinguish between the restraints which business concerns might lay upon trade and those which labor unions might lay upon trade. That the refusal to permit such a distinc-

tion was sound was amply demonstrated, some years later, in the facts of the Duplex Printing Press case, in which it appeared that the union was boycotting that concern at the behest of competing manufacturers.

The recent tendency of the Supreme Court, however, has been to hold that union boycotts do not violate the anti-trust laws. From the purely legal viewpoint, this conclusion appears to be based more on emotion than on reason, but no department of the law has suffered so much from emotional thinking as has labor law, and one more emotional decision should occasion no surprise.

We are not, however, interested so much in what the law is as in what it ought to be. Before the general Federal recognition of the principle of collective bargaining by employee representatives, the problem posed by union restraints of trade could not be solved with any degree of justice; any rule that was adopted would be arbitrary and would work as much injustice as it worked justice. This was so because the only rule which a union could follow in its organizing efforts was the rule that economic might makes right; and since boycotts, as in the Duplex case, were generally directed toward organization of employees, the union could argue that, if it were prevented from entering the economic arena to subdue an employer, it was deprived of its only organizing weapon. This argument was at least as just and at least as cogent as the argument of the employer that his markets were closed to him by combination. Under such conditions, Solomon could not have resolved the issue.

At the present day we are not under that handicap. The organization of employees has been placed upon a different footing, and, if not in practice, at least in achievable ideal, the right of the employee to select his union has replaced the might of the union as the organizing weapon. An orderly legal concept, however badly reduced to practice, has supplanted disorderly economic war. Today, therefore, we are in a position to attempt a solution of the anti-trust question in relation to labor.

CHAPTER III

CRAFT, INDUSTRIAL, AND HETEROGENEOUS UNIONS

Out of the varied conditions under which men earn their daily bread in employment have sprung different modes of labor organization. These differing modes of organization produce characteristics in particular organizations which must be understood if we are to understand labor as a whole. It is our purpose now to observe certain of these characteristics.

There have been three major organizational surges in this country, each founded upon a different organizational base. One surge produced the Knights of Labor, one produced the American Federation of Labor, and the third produced the Congress of Industrial Organizations. Minor organizational flurries such as that which produced the International Workers of the World (I.W.W.) provide no matter for the study of organizational principles that is not present in the larger movements.

The Knights of Labor was a "heterogeneous" or "one big union" organization. Its object was to unite all working men regardless of the craft or of the industry in which they were engaged. It was not a federation in the sense of a larger organization composed of smaller, relatively autonomous organizations, although it had both craft and industrial units within itself as a matter of organizational necessity. Its organizational aims embraced both skilled and common labor.

The American Federation of Labor, from its inception until the very recent past, was a horizontal or craft organization. The members of such an organization first organize themselves into constituent unions according to their par-

ticular skills, while the constituent unions, retaining in great part their own autonomy, band together into a true federation, the members of the constituent unions being employed in divers industries and having in common only that they follow the one craft. Thus a carpenter in construction work as well as a carpenter employed in maintenance work in a factory will be members of the Carpenters' Union, although their functions be as far apart as the poles in relation to industry. Likewise, a plumber employed by a department store and a plumber employed in a shipyard will belong to the Plumbers' Union. The Carpenters' Union then joins the Plumbers' Union in a federation.

It is not, of course, essential that craft unions federate. They may and do exist independently; witness the twist-hands in the lace and net industry. But, for reasons which we shall examine, in many cases a single craft cannot succeed without the aid of other crafts, and some sort of federation is relatively necessary.

This mode of organization naturally produces the condition that in the service of any one employer there will be found members of as many different unions as there are different trades. A small job printer will have members of the Typographical Union, because they follow the trade of compositor, and also members of the Pressmen's Union, because they follow the trade of pressmen.

It can readily be seen that in a complex industrial operation a breakdown into crafts will result in a very large number of unions. In an operation producing electric motors would be found the Molders' Union in the foundry, the Machinists' Union in the operation of finishing the housing, the Electricians' Union in the operation of preparing the windings, the Operating Engineers' Union and the Stationary Firemen's Union in the boiler room, the Carpenters' Union in the maintenance department, and several others.

The organizing pattern of the Congress of Industrial Organizations is the "vertical" or industrial union. This

pattern organizes the men of a single plant or employer or functional group "from the cellar to the roof" in one union. In the illustration given above, the molders, the machinists, the electricians, the operating engineers, and the firemen would belong to a single union. Their separate skills or crafts would be disregarded; their function in industry alone would determine the union. A carpenter employed by a bus company would be a member of one union, perhaps the Transport Workers, while a carpenter employed next door in a laundry doing similar work would be a member of the Laundry Workers' Union.

This meaning of the term "industrial union" is the meaning commonly attributed to the term today. There seems to be some probability, however, that the original significance of the term was more comprehensive, and that the present limited significance of the term results from popular confusion of the form with the substance of the idea. Whether this historical conjecture be true or not, it is important to understand both senses of the term, since two different institutions have resulted from the different senses, one of which we shall call in a later chapter "introvert industrial unionism" and the other of which we shall call "extrovert industrial unionism."

In order fully to grasp the difference we shall start by examining an inherent limitation on craft unionism. Let us assume that a manufactured article—for example, a portable electric sewing machine—is sold in a given market on a strictly price-competition basis, so that a relatively small price movement will direct demand from one manufacturer to another. Let us assume, also, that there are two manufacturers competing in that market and that the employees of each are organized craftwise into Carpenters on the cabinet work, Electricians on the motors, and Machinists on the frame and operative parts. Each manufacturer, therefore, will have three different contracts expiring, in all probability, at different times. If, now, one of the three unions of manufacturer A secures a wage increase which is

reflected in the selling price, that manufacturer will have to withdraw from that market and a layoff will ensue which will damage all three unions. The three unions of manufacturer B to maintain that employer's competitive standing in that market will feel obligated to keep their wage rates low. The net result is that the six local unions will be competing among themselves, first, over division of the market between manufacturer A and manufacturer B and, secondly, over a division of the income between the crafts—precisely the condition unions are generally organized to prevent.

The remedy seemed to be to create a union which would establish

1. Industry-wide control over
2. Every element of the labor cost.

The corollary of the first notion was industry-wide bargaining; the corollary of the second was cellar-to-roof organization. This was perhaps the origin of the term "industrial unionism," and the emphasis was more on the first notion than on the second.

The comprehensive idea was successful in industries where there was a large correlation between wages and prices. The element of wages, in most American industry, however, is greatly modified in its effects on price structure by the element of management, so that not infrequently the employer who pays the highest wages has the lowest labor cost. The comprehensive idea was, therefore, of distinctly limited application, covering such fields as coal mining, the needle trades, local service industries such as laundries, and other industries offering fungible goods or services. This comprehensive idea we shall later call "extrovert industrial unionism."

The cellar-to-roof idea was, therefore, probably economic in origin. As long as it remained a purely economic idea, it could not and did not produce widespread unionization of employees. The form remained, until, at a later day, the Wagner Act provided a rational organic base for

introvert industrial unionism, whereupon, from moral more than from economic wellsprings, the old cellar-to-roof form became the base of the new unionism.

These are the three types of organization that have been so far employed with some measure of success; the heterogeneous union, the craft union, and the industrial union. In practice today, of course, hardly any union adheres strictly either to the craft type or to the industrial type. Craft unions will sometimes organize a particular group of employees along industrial lines, while, less frequently, an industrial union will organize a particular group along craft lines.

The heterogeneous type of union does not survive in any practical way today. The phrase "one big union" is scouted in labor circles and almost everywhere else. Nevertheless, the idea of "one big union," called by other names, is one of the most tenacious ideas with respect to unions even to the present day. The idea is found in conservative employer circles where it is generally hoped that labor will achieve unity. It is found among labor leaders and liberals who deplore "the unfortunate breach in the ranks of labor." It is found in the request of the President of the United States to Messrs. Murray and Green that they seek a formula for merging the A.F. of L. with the C.I.O.

The "one big union" idea, dressed up in other language, has found popularity today because of a current impression that the troublesome interunion conflict erroneously called "jurisdictional" will be quelled by this means. The falsity of this impression is amply demonstrated by the long-drawn-out struggle between the Teamsters and the Brewers, both A.F. of L. unions, over the affiliation of brewery delivery forces, by the internecine history of the Carpenters (A.F. of L.), by the looming conflict between the Transport Workers and the Utility Workers within the C.I.O., and by other like conflicts.

As a matter of fact, in most cases under our present laws, the problem would be complicated, rather than solved.

The Labor Boards now hold elections to determine which of two unions represents a particular employee grouping when the unions do not have common affiliation. When, however, the conflict is between commonly affiliated unions, the Labor Boards will not intervene; some because of self-imposed restrictions, others because prohibited by law. The law, ostrichlike, refuses to notice that there is a dispute. Unfortunately, the dispute continues to exist, and since the law will not apply the obvious solution—the choice of the employees—the mightier union in the particular case wins.

Aside from its impracticality, there are weighty reasons why the “one big union” idea should be done away with, in whatever dress it may appear. A full discussion of them cannot be undertaken here, but they may be briefly stated:

1. The idea is basically that of working-class solidarity, which has the ugly note of class warfare.
2. It deprives employees of an effective choice of agencies for bargaining.
3. It creates a labor monopoly, against which no employer could hope to stand.

Likewise, although a full discussion cannot be given of a counterpolicy to the “one big union” idea, it may be said that the tendency of the Labor Relations Acts is to encourage the formation of dual unions each competing for the favor of employees. What appears to be needed now is not a merger of A.F. of L. and C.I.O. but a peace treaty covering most industries, grounded on a recognition by each of the right of employees to choose between them, a right to which each now gives at least lip service.

While the idea of an undivided house for labor is tenacious, its tenacity is largely confined to the labor philosophers, administrators whose heads would lie less uneasy if there were but one union, and to labor apologists who conceive that there is some stigma in division. The masses of laboring men and women cherish the right to select their representatives, to pick and choose among existing unions,

and to create their own unions when the existing ones are unsatisfactory. The practical proof of this is that the A.F. of L. and the C.I.O. coexist and compete between themselves and with other unions, a situation which could not exist unless those masses were minded to choose. There is no stigma in division, which is the normal and inevitable consequence of freedom of choice; the stigma falls upon organizations which, claiming the benefits of employee choice, seek to deny the right of choice where the choice is adverse to them.

There is a very fundamental point involved in this matter, a point which is missed by most of the publicists. That point is that a fusion of A.F. of L. and C.I.O. will not result, save temporarily, in a unified house of labor unless the Wagner Act is repealed or emasculated. Unless the right of the employees to choose be abolished, the employees will create other dual organizations to substitute for the merged institutions. The same forces which move employees to dualism now will move them to dualism even after the merger. Unless we abolish the right to dualism, the right of choice, we must recognize that dualism will exist.

It is a rather late date to undertake to abolish the right of choice.

CHAPTER IV

ORGANIZATIONAL DIFFERENCES— CASUAL AND TENURE LABOR

We now consider the characteristics peculiar to the craft union and those peculiar to the industrial union. To lay a foundation for adequate consideration of the differences, some thought must be given to two types of employment which affect radically the mode of organization. We may call one of these types "casual labor" and its opposite "tenure labor."

The characteristic of tenure labor is that the employee is hired either for a long term or for an indefinite term which it is anticipated will be long, and forms part of a substantially permanent working force; a salesman, a gasoline-station attendant, or a machinist employed in a manufacturing plant illustrate this type. On the other hand, the casual laborer works by the day or for some short time usually limited to the duration of a particular job of the employer; a bricklayer on a construction job; a stevedore hired for the lading of a particular cargo are examples of this.

For organizational purposes, the chief distinction is that in the case of tenure labor there is a relative fixity of the relationship of one employee to one employer and a relatively stable working force, whereas day labor imports a shifting of the employee from one employer to another and a like shifting of the working force of any one employer.

In the case of casual labor, it is obvious that one cannot organize the employees of any one employer as such with any degree of effectiveness, because in a week or a month the job will be completed and the organization scattered to

the four winds. There are, therefore, two modes of operation left which may be used conjointly:

1. Organize enough of the men in the reservoir of man power in a given labor market area to ensure control of many employers.

2. Organize the men through pressure on the employers in a labor market area by picketing, boycotting, strikes of other employees, or like means.

Whichever method be used, the ultimate security of the organizational effort must be a restriction on the employers to hire none but union men, and a restriction on the journeymen preventing them from working for nonunion employers. In practical effect, these restrictions are identical.

In this casual labor class, successful organizing always entails a degree of compulsion. There is a true "market" from which such labor is drawn resulting from the short duration of jobs and frequent hirings. As in all markets, the weakest sellers set the tone, and a relatively few employees working for substandard employers, who are thus enabled to underbid the standard employers can wreck the market for the majority. Hence in this field, unions are successful to the extent to which they are monopolistic. Whether the monopoly is of employers who have agreed to close their shops or of employees who have agreed not to work save for employers en rapport with the union does not matter.

Thus the closed shop and prohibitions on dual unionism and on employment by nonunion employers are minimum requirements of unions operating in this field. Relaxation of these controls spells the ruin of any union. It may safely be said, speaking of this limited field, that unless the closed shop, the prohibition on dual unionism, and the open-shop prohibition are permitted, there can be no unions at all.

Other peculiarities attend organization in the casual labor field. Among them is the impossibility of maintaining a one-plant or one-employer union; unions necessarily tend to embrace the whole of a craft as such, regardless of the

more or less temporary relationship that may exist between a particular group of employees and a particular employer. This is highly important when considered in relation to the representation of employees by unions, for it is obvious that a union cannot "represent" employees in this field in the same sense that it represents tenure labor in its relationship with management. We shall consider the problem raised by this fact at some length later.

Again, federation of craft unions in this field is almost inevitable. If unions of the different crafts do not federate and bind their members not to work on jobs done in any part by nonconfederate labor, it is obvious that employers will be in a position to utilize unorganized men to do most of the jobs and call only on those unions in whose craft there happens to be a current shortage of labor. Consider, as an example, the construction of two projects, the first a one-story brick structure for store occupancy involving little plumbing and steamfitting and the second a refrigeration plant including only such brickwork as is necessary for the footings of the power plant but entailing a great deal of plumbing. On the major operation in each job, bricklaying in the first and pipefitting in the second, circumstances may force the hiring of union help, or, if not, the size of the job will warrant picketing, boycotting, or like measures to secure it. On the minor operation (and a number of minor operations may form the bulk of an entire job) the employer might succeed in employing nonunion men and hence the greater part of these minor operations, which in the aggregate are a large factor on the "demand" side of the labor market, will be lost to the unions.

The corrective applied by the unions is to refuse, in federation, to do any job any part of which has been done by nonunion help. In the building of the store, for instance, the bricklayers will not work unless the plumbing is done by the confederate plumbers' union, while in the building of the refrigeration plant the pipefitting trades will not work unless the footings be done by the confederate bricklayers'

union. Thus are both unions benefited by federation. It is extremely difficult for any craft union to survive in the day-labor field without some such arrangement.

From this observation, it is an easy step to the corollary that the rule of these unions against working on jobs which are in any part done by persons not in confederation is essential to their existence. This does not mean that the rule need be applied to the ridiculous extremes to which it is sometimes stretched, but merely that the rule in its normal applications is a minimum requirement for the existence of unions in this field. Some extreme and indefensible applications have been made, for instance, in connection with trades for which no confederate union exists.

Another of the characteristics peculiar to this field is that the functions of unions are largely devoted to the fixation of wage and hour schedules and stint, or work limitations, and of rules designed to maintain them, and little devoted to working conditions or grievances as such. This results from the fact that grievances or bad working conditions do not, over a short span of employment, loom so large in the minds of employees as they would if the jobs were more permanent. Occasionally, however, even in this field working conditions become the subject of disturbance, as in the case of a large demolition contractor whose operations had been conducted over a period of time in such a manner as to result in a needlessly heavy death toll.

The characteristic of unions in the casual-labor field which has caused the most public criticism is that unions are obliged to maintain their "jurisdiction" over types of work within the scope of their respective crafts even against their own affiliated unions, giving rise to one of the two forms of true "jurisdictional" dispute. Now the organization of men according to craft is a natural organization. Just as physicians join physicians, dentists join dentists, and lawyers join lawyers so do masons join masons, structural ironworkers join structural ironworkers, and machinists join machinists to protect their peculiar interests.

The jurisdictional dispute is not peculiar to labor unions. Lawyers dispute with notaries, with trust companies, with insurance companies, and with collection agencies over the boundaries of their field. Physicians dispute with chiropractors, podiatrists, osteopaths, and optometrists. Engineers dispute with architects and builders. Last but not least, among businessmen of all sorts there is competition for business which is an effort to obtain "jurisdiction" of a customer or a territory or a commodity—and devices such as multiple-line forcing, cumulative rebating, and loss leaders are sometimes the instruments of warfare.

Under these circumstances it would be hard to find one without sin to cast the first stone at labor unions seeking to protect their respective jurisdictions. Be that as it may, the settlement of jurisdictional lines is one of the most perplexing of problems, and it is a problem which will not stay solved.

The progress of discovery and invention has created and will continue to create new alignments of work in areas which, in the nature of things, cannot be plotted in advance. The substitution of a metal footing for a wooden footing to a plaster wall produced a conflict between the carpenters and the metal lathers; the coming of air conditioning, oil-fired furnaces, and mechanical refrigeration resulted in a mad scramble between pipefitters, sheet-metal men, machinists, millwrights, and other unions for the work.

These jurisdictional disputes do not stop at the boundary lines of unions but affect the unions internally as well. Thus plumbers, steamfitters, and the helpers of both contest with one another on the question of where plumbing stops and steamfitting begins, though all are members of one union. One electrical local has some thirteen divisions of the general craft within itself, no one of which is permitted to work on the business deemed proper to another; *e.g.*, an "alteration electrician" will not be allowed on a construction job, nor a "construction electrician" on an alteration job.

Another peculiarity is that the employers in the day-labor field are themselves divided craftwise for the most part. General contractors usually undertake to construct with their own employees but small portions of a job or will undertake work proper to not more than one of the crafts involved, letting out the balance of the work to mason contractors, heating contractors, electrical contractors.

Still another characteristic of this field is the fact that working conditions tend to vary more with the particular job than with the employer. Trade practices control many of the elements of a job, and supervisory personnel themselves shift from employer to employer. The ability of the employer to pay a wage scale, for instance, is never drawn in question, but if the employer "goes broke" there is, of course, the question of default in wage payment.

Again, many unions operating in this field do not bargain collectively in any real sense of the term, and some of them do not even pretend to bargain, setting rates and standards without consulting employers and requiring employers to conform to those standards. Those which do come to the conference table, union and employer alike, come to perform an entirely different function from that performed by tenure-labor representatives and their employers. This arises out of the fact that employers in the day-labor field rarely have any sizable permanent investment in plant and equipment which will be jeopardized by nonoperation and almost never have an inventory. When they meet with labor, they are setting rates to be paid not by the employers, but to be incorporated in contract bids to be made in the future or passed along to others in toto under cost plus agreements, construction extras, and the like. If the conditions of labor be set too onerously, the employers do not face bankruptcy or even substantial deficits; if the rates are too high, the index of construction drops, or stevedoring operations move to a cheaper port—there is a diminution of the market for the product or service. Upon contraction of these markets the employer simply does not operate and

while he makes no profit, no great loss is inflicted on him. If the setting of rates in such fashion is collective bargaining at all, it certainly is a very different thing from the bargaining done in the manufacturing and commercial fields. Corollary to these conditions is the fact that rigid standards can be set applying to all jobs and all employers. The process resembles more closely the price-fixing process of the medieval guild or the activity of a corporation in a corporate society than it does the industrial practice of collective bargaining.

Lastly, referring back to our discussion of a business as a going venture and the nascent property right of employees in that venture, we are compelled to observe that the casual laborer has no such community of interest with any one employer, or even with any group of employers as will give him an interest, however shadowy, in a business. Indeed, employers in this field are themselves often constituted for the execution of a single job and die as social organisms with the completion of that job. The most permanent thing in the whole field is the union itself.

Industrial organization in the casual labor field is practically nonexistent. The stevedores and longshoremen of the West Coast are, it is true, organized in an affiliate of the C.I.O., but the union, nonetheless, is for all practical purposes a craft union. The United Construction Workers have had, to date, but slight success. The difficulties in the way of organizing this field on the industrial model may not be insurmountable, but they certainly are very great.

The craftwise division of the employers on any one construction job is one of the obstacles. Another lies in the difficulty of setting up pay standards for different types of work, such as carpentry, steel erection, pipe fitting, which would seem to require some subdivision of an industrial union. Internal dissension would probably follow an arrangement which would permit a man whose chief skill lay in, say, plastering, to do masonry work. Such unions might ultimately be forced into a position such that, rather

than maintaining standards as do the craft unions, they would actually become, in substance, bidders to the employer or to the consumer, required to vary the labor price from job to job depending on circumstances. That consequence may not be evil, but it is far out of line with present-day practice.

In advance of actual substantial progress in this field by the industrial union, any conclusions drawn can be but speculative and since our examination is confined to the practical, we here leave the matter with the sole observation that in considering legislation care must be taken not to inhibit development along these lines, if in the future someone can think his way through the obstacles to industrial day-labor unions. Perhaps the problem might be worked out by using as a base the hiring by a contractor's pool of a certain number of craftsmen at a guaranteed annual wage to work as assigned to different contractors. Certainly the general idea possesses elements of attractiveness to employees in giving them a secure budgetable income and to employers in reducing the cost of jobs by reducing the "padded" pay rolls incident to jurisdictional rights. This, however, is wholly speculation.

We come now to a consideration of the modes of organization of tenure labor. In this field there is substantial organization along craft as well as along industrial lines, although at the present time the latter type predominates.

Craftwise organization in the tenure-labor field is quite old in this country. The flourishing International Typographical Union traces its antecedents back beyond Civil War days. By and large, however, the craft method has proved itself not adaptable to complete organization of any single employer save where the enterprise is simple in structure, including but few crafts, among which is generally found one which accounts for a substantial part of the pay roll.

An example of true craft organization is the printing business where the compositors, both hand and machine.

and proofreaders are organized as one craft, the stereotypers and photoengravers as another, the pressmen as a third, the paperhandlers as a fourth, and the bookbinders as a fifth. There are, however, gaps in this structure not covered by any union; the proofreaders' copyholder, for instance, has been denied membership in the compositors' union as not being a member of the craft, even where such help has gone on strike in support of the compositors.

Railroads were originally organized chiefly on a craft basis. Here the organizations of locomotive engineers, of firemen and enginemen, of trainmen, and of signalmen take in the bulk of the employees, the remainder being distributed among about fourteen other crafts. As we shall see, unions in this field have lost their craft character.

These, however, are almost the only examples of craft-wise organization of a large aggregate modern industry. There is fractional organization of a great deal of industry, the prime example of this being the truckmen, who have membership in industries otherwise chiefly unorganized; *i.e.*, the truckmen, alone, among the employees of a single employer will be organized, the remaining employees being nonunion. Fractional organization is also found in the case of licensed personnel, such as stationary engineers, or in trades where there is a chronic scarcity of competent men, such as blacksmiths, and in highly skilled trades such as lace and net twisthands.

The great bulk of organization of tenure labor, however, is of the industrial type; and this is true today of A.F. of L. organization as well as of C.I.O. organization. This phenomenon is rooted in the nature of tenure labor, and we shall observe some of the rather complex causes of it as we proceed. Whatever be the causes, the fact is undeniable—that the organization of tenure labor with few exceptions can be accomplished only on the industrial plan.

The prime characteristic of tenure labor gives rise to a fixity of relationship between the employer and the working force as a force, so that there may be a true representation

of that working force. This is utterly different from the situation in the casual-labor field where a union represents only some portion of an ill-defined class of craftsmen. In the latter field, the union can speak but for itself as an organized body and must deal as principal, while in the tenure field the union can speak as the representative of a defined body of men.

Because the body can be readily defined, majority rule is possible in the tenure field. Majority rule is impossible in the casual-labor field without incorporating the entire reservoir of labor which is available for the performance of particular classes of work in a locality, a difficult, almost impossible, thing to accomplish except when a decasualization pool or local licensing exists. The National Industrial Recovery Act sought to incorporate labor in this way and the result was utter confusion, due in some part to faulty administration and in some part to the wrench of the public mind out of its long settled concepts but due in greatest part to the inherent difficulty of tying people up in neat little bundles.

Majority rule has been attempted in the casual-labor field in the case of the West Coast Stevedores, wherein the National Labor Relations Board undertook to determine the bargaining agent for all stevedores in all ports, and certified a C.I.O. union as bargaining agent on a coast-wide basis. The stevedores of the Port of Santa Barbara, however, were A.F. of L.-minded and refused to work under the arrangement. The upshot was that the Port of Santa Barbara had to be taken out of the unit prescribed by the Board and today it is in the hands of the A.F. of L.

A casual observer will simply set the incident down as a mistake of the Board, which, indeed it was. But the misconception that produced the error is important. The Board, instead of regarding as the proper unit the reservoir of labor available to employers at a particular port, regarded the operations of the employers as the proper unit. It had applied a rule adapted to tenure labor to the day-labor field,

and the result of its building collapsed. In making the error the Board but parroted the Wagner Act so that legally there was no error. The error lay in the Wagner Act itself which failed to take into account the monopoly characteristic of the day-labor field and provided for "employer units," "plant units," and "craft units," interpreting "craft unit" as a division of the business of one or more employers rather than a unit coterminous with a particular craft in a labor market area available for the performance of a particular run of work regardless of the employer.

Nor was the Wagner Act improperly drawn in this respect, unless we are to quibble about its failure specifically to exclude day-labor situations from its operation. That the day-labor unions recognize the practical inapplicability of that statute is amply demonstrated by the infrequency of their appearance before the labor boards. They do not come because they recognize the futility involved in procuring an order on their employers to bargain; in short, they realize that monopoly is their sole salvation. In order to encompass this day-labor field the Wagner Act would have had to deny the mainspring of its own being—the right of employees to choose between unions.

In contrast to day labor, tenure labor is susceptible to organization shop by shop, either through the employer being induced or coerced to unionize his employees or, especially since the elective principle became law, through the volitional act of a majority of employees. An organization in this field need not approach a monopoly of the reservoir of available labor nor a monopoly of the available jobs. It may be successful as a one-shop union and may be confined even within one shop to some group homogeneously composed as to craft, function, or even location.

Federation of unions (understanding by that term a linking of the organization with others in different crafts or industries) in the tenure field is not so essential as in the day-labor field. Certainly it is not a *sine qua non*

of the existence of unions, although it may exert a powerful influence on the bargaining power of the union. In some cases it can add nothing to the bargaining power of a one-plant union.

The zenith of bargaining power in this country is probably to be found in the employees of the Bell Telephone System. They work in an industry operating a physical plant of unparalleled technical complexity, which complexity is reflected throughout the corporate structure in specialized accounting methods, public-relations methods, legal methods, administration methods. They constitute in themselves a practical monopoly of the available labor supply of the industry. Even employees of other concerns skilled in the art of telephony or its branches, if available, would require a substantial reorientation and training period in the peculiarities of the Bell System before they would become adequate Bell employees. A strike participated in by an adequate number of Bell System employees would therefore be an unbreakable strike. In short, the Telephone Unions are the absolute masters of their employers. It is obvious that the federation of the Telephone Unions into the A.F. of L. or the C.I.O. would add not a whit to their bargaining power.

There are other employee groups which, in greater or less degree, and through different sets of circumstances, exercise a comparable power. But there are other groups so low in the scale of bargaining power that almost their whole strength comes from without through federation. Unskilled labor, even in tenure employment, has very little bargaining power and federation with other unions which control, for instance, the employers' supply or outlet transportation, is the only way in which its bargaining power can be brought up to anything like parity with the bargaining power of the employer. Hence federation, while not an absolute condition of organization as in the casual-labor field, is necessary in varying degrees to the achieving of the practical results intended by organization.

The command of the Wagner Act that the employer must bargain has added some strength to such unions, but it has thereby reduced the value of federation.

Affiliation (linking with other organizations in the same craft or industry) in the tenure field has very little organizational significance. It is not a condition of organization nor does it add to bargaining power until it approaches monopoly of the available labor supply, a condition which very seldom occurs. It does, of course, tend to produce business agents and organizers trained in the special line of work or industry, and to provide a forum for the discussion of common problems. In some few industries selling commercially fungible goods in competitive markets, where the wage scale is a high percentage of the selling price, *e.g.*, coal, substandard wage scales tend to break down all wage scales through employer pressure. In these industries, industry-wide organization is sought by the unions and the employers of organized shops to augment bargaining power, not in the shop to be organized but in the organized shops. The sequelae of this urge may be seen in the Hitchman, Coronado, and Carter cases, in the corporatism prescribed by the Guffey-Vinson Act, and in the contract struggle over the Southern coal-mine wage differential.

In the tenure-labor field the closed shop is no longer an essential condition of organization. The device of the "exclusive bargaining agent" with whom the employer is required by law to bargain now discharges what was once the chief operative function of the closed shop in this field, the setting of conditions uniformly throughout a shop. It is most important to realize the impact of the labor acts on this phase of unionism. In 1903 Samuel Gompers could say, "It is absurd to consent to or give assent to the organization of labor and deny the logical result—the union shop," and his conclusion would be perfectly true because at that time, the only known device for making a union the exclusive representative was to force all employees

into membership. But today that conclusion is an anachronism because of the legal obligation to deal with the majority representative. The closed shop in the tenure field has thus lost its original significance, although its vestigial functions of dues collection and union security remain. We shall later discuss the closed shop in detail.

The change in this respect is observable in the literature of the two periods. Today when we speak of "open shops" we indicate shops in which membership in a union is not a condition of employment or tenure. Before the device of the exclusive bargaining agent was introduced, like as not a person using that term meant a shop wherein there were no union men, or a shop wherein there was no agreement with a union, *i.e.*, an antiunion or, at least, an unorganized shop.

Another way of stating this fact is to say that today a shop which conforms to the standards of the Wagner Act is in some wise a closed shop. In a very real sense it is closed—no other union may intrude; nonunion men are as a practical matter, if not in strict legality, bound to the union contract terms, and the employer is legally bound to deal with the union. Full shop closure would add to these notes only dues collection and "union security."

We now leave the subject of organizational modes, having laid a sufficient groundwork. The most important thing observed is the radical difference between casual labor and tenure labor. Great stress is laid upon these two different branches of labor because much of the current confusion of the public mind and of the legislative mind stems from failure to recognize the difference.

Our present laws are drawn in utter disregard of the distinction. Worse, remedies are suggested for the evils peculiar to casual labor and are sought to be made applicable to both casual labor and tenure labor, and vice versa. Union leaders speak from the standpoint of casual labor if they are in unions predominantly in the casual field, yet their statements are applied promiscuously to the ten-

ure field. Construction executives make pronouncements based on casual-labor experience, industrial executives make pronouncements based on tenure labor experience, but the statements of both are construed as applicable to both fields without distinction.

We would not think of setting single legislative standards for banks or for insurance companies. Radical differences exist between savings banks and commercial banks, to mention two varieties, which would ruin one class if it were required to adhere to the standards of the other. Likewise, if fire insurance companies were required to observe the reserve standards which should be required of life insurance companies, they would not long be able to meet their claims as they come due.

Just as the term "insurance company" embraces some five kinds of institution, each radically different from the other, just as the term "bank" embraces such radically different institutions as the savings bank and the commercial bank, so does the term "labor" embrace different phenomena—casual labor and tenure labor. Until we make the distinction first in thought and then in law we shall heap confusion on confusion.

CHAPTER V

MONOPOLY UNIONS

To understand labor as it is today we must understand, in some part, labor as it was prior to the present era. Social changes are not accomplished overnight; the minds of masses of men cannot be wrenched out of their wonted channels and given new direction quickly. As a rule, each new development accommodates itself, in some degree, to the existing mental habits of the society into which it intrudes, so that the net social change contains currents resulting from the new development side by side with more or less vigorous currents stemming from the old.

Labor today is a composite of currents originating in the "A.F. of L. era," which covered roughly the last quarter of the last century and first quarter of the current century, and the new current, which is founded on the principles embodied in the Wagner Act. There are also traces of corporatism infused in the days of the National Industrial Recovery Act.

Not a little of the present chaotic state of labor results from failure on the part of nearly all sections of the public to realize that our present labor institutions are a hodge podge of the three. A full realization of this fact would be a starting point for the formulation of a definite and practical labor policy. It would be no more than a starting point, however, for neither the principles of the A.F. of L. era nor those of the Wagner Act, nor those of the N.R.A., are capable of being applied successfully over the whole of industry.

The A.F. of L. got its start on the heels of the closing Knights of Labor era. In contrast to the Knights, who aimed at organizing all labor, the A.F. of L. limited itself in

principle to organizing skilled labor. It adhered to the policy of organizing according to skill, right down to the day when John L. Lewis led out his forces to form the C.I.O. There was in the A.F. of L. a tendency to form industrial unions, some of which were actually successful, but the general tenor of its policy was along craft lines.

Craft organization is a very natural form of organization. But it was something more than a vague affinity between those engaged in common pursuits that brought the A.F. of L. into being; it was a very practical judgment drawn from the experience of the Knights of Labor; *viz.*, that the organization of the unskilled was an impossibility, and that only through the organization of the relatively few skilled workmen could a union hope to succeed.

This judgment was correct when it was made and for half a century thereafter. If it had not been correct, the A.F. of L. could not have succeeded but would have been engulfed by industrial unionism. It is important to appreciate not only the reasons for the correctness of the keystone of the A.F. of L. but also its influence upon the the A.F. of L. itself and the shape that it gave to the labor institutions which resulted.

At that time the structure of industry was considerably different from what it is today. Shops were smaller and the working force in any one shop was subject to more variation than it is today because each shop was closer to its market. Production tended to be a hand-to-mouth process rather than a process planned at long range; hence any one shop varied its volume—and its working force—frequently and violently. Jobs, therefore, tended to fall into the casual class rather than into the tenure class.

Skill was a much more important factor in industry than it is today. The artisan of those days was required to be an all-round man. A machinist, for instance, would be required to perform every operation necessary to the manufacture of a variety of items, to use all varieties of machines, to work with a variety of metals and know the character-

istics of each, to improvise machine setups and often the details of manufacture. Today the all-round machinist is a rarity. Operations on single items of manufacture have been broken down so that each employee, instead of following an item through the productive process, performs perhaps but a single operation on one machine. The skill has been chopped up and distributed among many classes of employees, no one of whom, as a general rule, is competent to do the work of another. The present job classification scheme of the National Metal Trades Association, the trade organization for the machine shop industry, recognizes over 150 classes of employee.

Now skills such as those common at the time of the formation of the A.F. of L. took time to acquire. The forced draft training programs of today which make a housewife into a lathe operator in three months were then impracticable. Instead most trades had apprenticeship requirements running commonly from three to five years. A limited class of journeymen was thus created whom it was hard for employers to replace.

This fact was seized upon by the A.F. of L. and made the keystone of its organizing policy. It was impossible, the founders held, to organize the unskilled because the unskilled were readily replaceable from the ever-present floating labor supply. However, by organizing the limited classes of skilled workers, a substantial leverage could be obtained with which to control the skilled "labor market."

This organizing principle necessarily and designedly involved an attempt to procure a monopoly hold on the particular craft sought to be organized. For, if there were not such a control, the skilled men would be replaceable and the whole structure would fall apart. Violent measures, boycotts, and sympathetic strikes could, of course, hold a union together for a time, but nothing of enduring value could be constructed without resort to the monopoly principle.

The A.F. of L. founders recognized this fact and acted upon it. As might be expected, their greatest and most permanent success was in the casual labor field, where the frequency of hiring made a relatively small percentage of the whole skilled labor force able to control the labor "market." Outside the casual field, success tended to be high in the highly skilled trades, low in those less skilled.

In those fields of tenure labor where mechanical advances have so simplified jobs as to dilute skills, the craft unions have suffered; in other trades, where mechanical advances have kept up the skill level of the craft, *e.g.*, substitution of linotype for hand composition, the craft union has held its position, and even advanced. The history of the A.F. of L. is eloquent testimony of the sound judgment of its founders in adopting the monopoly principle of organization.

Incidentally, the taunt frequently hurled at the A.F. of L. to the effect that it was an aristocracy of skilled workers who cared nothing for the improvement of the lot of the common laborer loses much of its force when we appreciate the very practical reason for its organizational policy. Unfortunately for the A.F. of L. it seems to have forgotten on many occasions the principles upon which it was organized.

The monopoly principle entails certain organizational peculiarities which must be comprehended:

1. The scope of the organization must tend to embrace the limits of the craft in the labor market area.

2. The organization must tend to be exclusive within the craft in the particular labor market area.

3. The organization is not based upon majority consent of the craft in the labor market area, nor upon majority consent of the employees of any single shop, but upon consent of such number of craftsmen as is necessary to "corner" the labor market, given such extraneous aid as boycotts, sympathetic strikes, and picketing. The organization must contemplate the overriding of the wills

even of a majority of employees in the craft, if that should be necessary.

4. The organization must attempt to speak for the whole craft and it must subordinate the interest of member groups in particular shops to the interests of the craft as such.

5. The organization must make its contracts as principal, not as representative of any particular group of employees, and it must, in some degree, assume responsibility for the skill of its members, and, by union-imposed discipline, compel the employees to comply with the contract terms.

Before observing the ways in which these organizational characteristics left their marks upon the labor field, one further fact must be appreciated. This fact is that a great many organizing efforts in the craft field had the benefit of substantial employer support. In some cases, this resulted from the fact that many employers in the days when the industrial scheme was simpler were themselves craftsmen and often voluntary members of the union. Many of this class were journeymen one day and employers the next and looked toward preserving their journeyman status. In other cases, the employer support derived from the fact that a strong union served to stabilize the industry in such a way as to prevent ruinous competition. In other cases, an employer, once organized, fostered the organization of competitors.

This employer support was, and in some cases still is, a powerful factor in craft organization. It is a factor which is likely to be overlooked, for the reason that union history, like national history, tends to emphasize the battles rather than the even tenor of peacetime ways. It stands to reason that a union cannot be successful if it is constantly embroiled with the greater number of the employers with whom it must deal.

Employer support may take various forms, some of which tend to conceal the fact of support. For instance, an employer association will be organized "to fight the

union." If "fighting" means that the association merely is attempting by concerted action to obtain for its members better contract terms, then the association is actually supporting the union organization even if it quarrels with it on minor issues. By the act of contracting, whatever the terms, a status and a standing in the craft is given to the union, which otherwise it must obtain by piecemeal conquest in which its very existence as a union is often at stake. Parenthetically, this explains the fetish of "union recognition," an essential in the casual trades but an anachronism where the Wagner Act applies in a workable manner.

It should be mentioned that employer support has not always been a good so far as the employee is concerned. Many of these trade association-union relations, especially in the clothing industries, are regarded by a substantial part of the workers as combinations to control labor rather than to advance it. Gestures, usually grandiose, are made to demonstrate the beneficent activity of the union, but many workers feel that the union is closer to the boss than it is to them, and there is, no doubt, some truth behind the charges.

Returning now to observe the marks which the monopoly organizing principle left upon labor organizations, we have only to contrast the situation today, when two unions can exist, in the tenure labor field at least, side by side in the same community without a struggle, with the situation existing before the passage of the Wagner Act. Today, such unions may, but do not have to quarrel. When the monopoly principle was in its heyday, so long as there was a competing union, the existence of each was threatened, for employers might then contract with whichever union they chose. Hence we find, in the A.F. of L., strictures against "dual unionism," *i.e.*, the operation of a competing union, a simple recognition of the fact that the union had to be a substantial monopoly, or perish. The strictures against dual unionism are still in effect in the craft unions

in the casual trades, where the Wagner Act is unworkable but *sub silentio* have become somewhat of a dead letter in the tenure field where the Wagner Act has been effective.

Another mark relating to the labor market area idea is found in the strict territorial limits assigned to A.F. of L. locals and jealously maintained by them, even against members of sister locals. Locals tended to establish their own standards of working conditions; therefore, to permit an employer to contract with a sister local or its members for work to be done in an area would tend, firstly, to break down standards and, more significantly to throw into the labor market a surplus of men which would render the local monopoly less secure.

The intolerance of such unions toward nonunion shops and nonunion men is often commented upon, usually in unfavorable terms. Few persons thinking 1945 thoughts will stop to realize that such intolerances were a necessary condition, in those days, to the very existence of the union, because, unless it guarded its monopoly, it was doomed. It is important to realize that, in the casual field, a like necessity exists today.

The element of consent is found to a degree in all unions, yet both in quality and quantity of consent the old craft union differed considerably from the standards applied in gauging consent today. On the qualitative side, in theory, the consent amounted to a choice between becoming a member of the union, on the one hand, or exclusion from the trade, on the other. In practice, the unions sought to achieve their ideal of excluding all nonunionists from the trade, with, of course, varying degrees of success.

By current legal standards which control employer conduct and which are slowly becoming the practical standards of unions at least in the tenure field, the choice presented to employees is not one between cooperation and penalty but choice between cooperation or noncooperation. The difference is a vast one and it must be clearly understood else the term "consent" is ambiguous. The "con-

sent" of the old craft-union days contemplated at minimum a certain element of economic duress.

To avoid a confusing thought tendency of modern labor relations, we must dissect this duress consent one bit further. Putting aside the cases in which, with no substantial worker support, a union succeeded in procuring control of an industry, the pure "racket" or terrorist cases, the legitimate craft union sought the purely voluntary "nonduressed" consent of a "core" of workers. Once the consent was given and the core formed, the union set about obtaining sufficient consents to control the industry. It did not matter, however, what force, economic or physical, was used to obtain the remaining consents. If a workman would not give his consent, some form of duress—economic or physical—had to be and was applied to bring about that consent.

There is a tendency, particularly noticeable in the labor field, to lose sight of the duress quality of consent because, in some cases, consent is obtained without the actual application of a penalty and because, in some cases, the worker is minded to join a union even though sanctions be not applied. If you lose sight of the "ultimate sanction," exclusion from the trade or physical harm, and conceive a craft union as an organization dependent upon a free choice of the majority, you place the craft union upon a plane upon which it has never existed. To go further and enact that false concept into law will destroy craft unionism, because it cannot exist upon the plane of free choice. The only organizational principle possible, today, as in the past, for craft unions is the principle of force, economic or physical. It is of extreme importance to grasp this, for the impact of the Wagner Act upon the labor field cannot be understood without understanding not only that force was used, but that it was the vital necessity of craft unionism and still is.

We have noted that the craft union, in so far as it was legitimate, had a consensual beginning, a core of workmen

who had, without economic or physical coercion, agreed to constitute the union. Once the union came into being, the continued consent of the core became unnecessary. A member was not, and could not be, permitted to withdraw at will unless he assumed a status which prevented him from engaging in the trade as an employee. Separation from the trade, or becoming an employer, were the only two generally recognized grounds for the issuance of an "honorable withdrawal card"; under all other circumstances a workman resigning, expelled, or suspended was considered to be prohibited from following the trade. The union constitutions, as a rule, provided that the union could not be dissolved so long as there remained seven assenting members, a number which was considered to be the legal minimum for unincorporated associations. Such provisions were dictated by the necessity for extinguishing the volition of workmen as a factor in organization.

Looking at the consensual element from the quantitative side, we see that in theory, at least, as few as seven were deemed to have a right to control the entire trade within the territorial limits of the union. Except in racket and terrorist cases, a great many more than seven, depending upon a number of factors, were necessary. To examine all the factors would unduly prolong the discussion, but it may be observed that, given the proper organizing tools, a relatively small proportion of the trade could control it, by a simple application of the rules of supply and demand.

How this could be done can best be seen by assuming a state of facts and working out the practical application of the principle. Assume that in a given bricklayers' labor market area, there are 10 employing contractors with a relatively steady job demand of 100 jobs. Assume that there are 100 workmen available, 10 of them union men and 90, to make the worst case, actively opposed. The supply precisely equals the demand. Assume, now, that five of the union men are employed at one time by one contractor, and strike. The contractor cannot replace them and is

obliged, in order to complete his job, to accede to a closed shop. Now it is obvious that, in the casual field, at least, the union has unbalanced the parity of demand and supply by one-tenth, which means that the men employed upon the next job of that particular contractor must join the union and, when they have once joined the union, all their jobs thereafter must, by union rule, be for union contractors. It is easy to see that by normal operation in such a labor market, the union can ultimately "corner" the entire market against the opposition of all of the employing interests and the vast majority of the workmen.

In the tenure labor field, of course, such a mode of organization was bound to be considerably less effective, with the result that the backbone of the A.F. of L. was the building trades unions. In the tenure labor field other modes of organization were necessary, a fact reflected in the pronounced use of physical violence in manufacturing, mining, and railroading as contrasted with the relatively small amount of violence in the building trades. Another reflection is found in the use of the boycott and sympathetic strikes against tenure employers and their non-cooperating employees, which latter group were often dealt with like pawns by union and employer alike.

Consent, therefore, as understood today, played a minimal part in unionism until, in 1926, the Railway Labor Act introduced the idea of nonduressed consent. Without an appreciation of this minimal role of consent and without an appreciation of the fact that unions could not be organized or survive, before 1926, upon the basis of nonduressed consent, we cannot see unions in their true light and we fall into the prolabor error of deifying their struggle or the antilabor error of ranking them as racketeers.

Neither of these views is accurate. At the basis of the system was force—economic or physical. As economic and physical force was used by employers, so was it used by unions. Apart from tactics of questionable morality in particular cases, it is not true that one side was sacrosanct

and the other unholy. Rather both sides operated in a milieu fundamentally disorderly, which justifies the use of force (up to a certain point) by either side if its object be not bad. One can neither deify nor condemn; one can merely justify.

Such a system, of course, spawned every conceivable form of abuse—racketeering, union busting, breaches of the peace, destruction of property, and outright murder. Not the least of the evils was, and still is, the use of employees as pawns in a contest for power between the union leaders and the employers, a contest often settled by an accord between the leader and the employer in complete disregard of the wishes and interest of the employees.

We turn now to the next point. For whom did the craft union speak? The answer to this question lies logically in the theory of the craft union—the theory of monopoly of the craft in the labor market area. Every monopoly, by its very nature, aims at uniformity; its object is the suppression of the individual differences or, at least, those effects of the individual differences which characterize its opposite, a competitive arrangement.

Hence we find the old craft union establishing pay scales applicable not to individual shops but to the exercise of the craft in any shop within its territorial jurisdiction—an area pay scale. As a corollary, we find provisions of union constitutions prescribing penalties for working below the union scale.

Also we find the maxim, "A fair day's work for a fair day's pay." To the union mind, this signified a leveling off of the quantity of work done at a standard, however rough. Not only was the extra-fast worker sought to be curbed, but, more in the earlier days than at present, a genuine effort was made to keep up the skill level of the membership by excluding incompetents. The early craft union leaders were keenly conscious of the necessity—imposed by the monopoly theory on which they operated—of preventing the unskilled from practicing a trade and

took vigorous measures, including skill tests, to keep the incompetent out.

Adding these facts to what we have already observed, we are forced to conclude that the old craft union did not "represent" employees in the sense that we use that term today. Instead, it represented a *craft*, a thing that was above and beyond any of its constituent members, a thing which was intended to be impersonal, perpetual, and which could exist even in the face of the opposition of the vast majority of its members and could oppose their individual interests or the interests of any group of them.

The closest analogy that can be mentioned is the legal idea of a corporation. Lawyers say that when a corporation is created the population is increased. A corporation is a personality distinct from the personalities of those who compose it. In much the same sense, a union is not a body of men, it is another person, the *craft* as a craft.

It is not meant to imply that the law ever recognized a craft as having a corporate personality. The law never did recognize the fact directly, and this accounts for a good deal of the legal fumbling, legislative, administrative, and judicial, which has attended labor law. To arrive at recognition of the corporate personality of the craft, the legal mind would have had to recognize the monopolistic character of the craft, which it shrank from doing, perhaps rightly.

We are now in position to examine our final point and some of its important corollaries. Stated in a metaphysical way, if the union is a craft and a craft is a person, then a contract made with the union is made with that person and not with employees, present or prospective. The employees are not in any sense parties to that contract; the principals are the union and the employer.

Looking at the same notion from a practical viewpoint, when an employer made a contract he was buying peace; not peace with his employees, not peace with his prospective employees, but peace with the union, which might or might

not number his employees among its members. He bought freedom from picketing and from violence not necessarily conducted by his employees. He bought freedom from boycotts, sympathetic strikes, and "hot cargo" restrictions, activities which, in their nature, could not be conducted by his employees. He compromised with a force, and that force was the union as such. The contract might contain terms obnoxious to his employees, *e.g.*, the abandonment of an incentive pay system, but his contract was not with employees, but with a union.

From the union viewpoint, the chief object of the contract was not to benefit the employees who might be covered by its terms, but to extend or perfect its monopoly control of the craft by establishing craft standards in the shop and by closing the shop. If the particular employees concerned were injured, that was incidental; if they benefited, and in most cases they did, that too was less an object, than an incident.

There are two logical consequences of this union-principal contract institution which survive today and add no little to the mental (and civil) confusion which is labor relations. These consequences are *contract stability* and *union responsibility*. The former is a fairly definite though anachronistic and disappearing reality at the present time; the latter is a phrase behind which at least three ideas have paraded.

Contract stability is simply the notion that, since the union is principal in a labor contract, the removal of the union destroys the contract. In the heyday of the craft union and even now in the casual field this notion had substance behind it, because the union and its contract were so inextricably related, and the employees as such so unrelated to either, that the destruction of the union carried with it the destruction of the contract and of any obligation of the employer under it. The employer had made peace with a power with which he had been at war and expressed the terms in the contract; if later the power with which he

had warred disappeared, then the contract disappeared with it. Since the employees, as such, were not parties to the contract, the existence of the contract was not dependent upon them but upon the union as such. (It should be borne in mind that employees were given some rights at law, but never as parties. "Third party beneficiary" and "custom of employment" theories were relied upon. We are speaking here, however, not of the law, but of the social institution.)

Expressed in another way, the employer did not have a contract with his own employees, but with employees at large who constituted the craft. The contract rested upon craft force and not upon employee choice. Whenever that craft force was greater than the force in the hands of the employer, a contract resulted; whenever it became less than the employer's force, a contract need not be made. The craft force, which was the union, thus became essential to the contract. Even if the employees desired another union during the contract term, they could not have it unless the second union could exert a force greater than that of the original union.

At the present time a union contract can be set aside, both in fact and in law, if not made with a majority representative; but the idea of a representative as we know it today did not exist prior to 1926. Failure to realize the essential difference between the union-principal contract of yesteryear and the union-representative contract of today has bedeviled the labor field. The bedevilment usually takes the form of adherence to the old doctrine of contract stability, which was robbed of most of its meaning by the Wagner Act. Until a new doctrine of contract stability, conforming to the social fact of today, is shaped, the bedevilment will continue.

The phrase "union responsibility" has been and still is being used as a cloak for two, perhaps three, distinct ideas. It has been used, chiefly by employers in the early days of the Wagner Act, to express the ability of a union to

respond in damages for breaches of its contracts—a purely financial connotation. It is now being used by some to express the idea of fair treatment by the union of its members according to rather nebulous standards, varying from individual to individual. Most of those using it in this second sense are as likely as not to include in the term the third idea, which we are about to describe. We are not interested in examining, at this point, the two senses just mentioned and merely describe them to prevent confusion with the historical idea of union responsibility.

The third, and historical, meaning of “union responsibility” is the idea that when a union executes a contract it assumes at least a moral obligation to the employer to carry out, both negatively and affirmatively, the terms of that contract. At the start, let us note that the historical idea of union responsibility is and ought to be valid in the casual field—but in the tenure field it is another anachronism and this is so because it is a direct corollary of the union-principal theory of contracts which ceased to be socially workable in the tenure field after the passage of the Wagner Act.

To the old craft union the term “union responsibility” meant an obligation upon the craft, which was not distinguishable in their minds from the union, to progress the employer’s work according to the contract, so long as he himself observed the terms of the contract. This obligation went beyond mere abstention from strikes and other affirmative forceful measures; it included the furnishing of craftsmen, a guarantee of the competence of the men furnished, and the maintenance, to a degree, of shop discipline not excluding but supplementing the employer’s disciplinary powers. It also included an undertaking that craftsmen furnished would work at contract rates, and in at least one court a union was held liable for the sums which an employer had to pay in excess of contract rates. As a practical matter, however, it became quite customary for

employers in some trades to pay more than the contract rate to attract and hold the more competent craftsmen.

It may be a novel concept to those whose experience is centered around the more modern type of union in the tenure field that the union should exercise shop discipline powers. Actually, in the casual field, the employer has, unless the union aids him, very little real power. The threat of discharge, which is a powerful weapon of the employer of tenure labor, is insignificant in the casual field because no employee is going to be impressed by discharge from a job which at best will last but a few weeks or a few months. The union, however, can maintain discipline, because it can exclude a craftsman from the trade. Since union discipline was the only effective discipline in the casual field, the employers were not too greatly disturbed about usurpation of their functions by the union.

Out of the institutions which are founded upon the idea of the craft as an entity grew an idea, or perhaps more correctly, a vaguely expressed attitude which has had a certain, but hardly definable, influence in the labor field. We shall not attempt to trace the influence, because it is so shadowy; we shall merely state the idea or attitude in order that we may identify it. The idea was that the members of the craft were fungible, *i.e.*, that each man in the craft (though they admitted, in some crafts, subdivisions) was interchangeable on the job with every other man in the craft; hence, the employer should be content to have furnished to him any member of the craft. Of course, in the casual trades, as a practical matter this had to be the accepted rule, not because some craftsmen were not better than others, but because the short tenure of employment tended to limit the possibility of selection by the employer. In those unions which paid special attention to keeping up skill levels, there actually was an approach to fungibility. In the tenure field, the fact that the craftsman represented an investment on the part of the employer tended to retard the progress of the idea of

fungibility, although there are at least two important survivals of it, the "job posting" seniority scheme in use on the railroads and the "substitution" scheme in use in composing rooms, whereby absent printers procure a substitute not selected by the employer. Modern aptitude testing and performance rating tend, of course, to counteract the idea, but the most powerful deterrent in the tenure field has been the disappearance of the all-round craftsman caused by the tendency of modern industry to subdivide the craft and dilute the skill.

CHAPTER VI

THE RAILWAY LABOR ACT

The modern era of labor relations begins with the passage, in 1926, of the Railway Labor Act, by far the most important labor act ever put upon an American statute book. With its timid and sadly muddled offspring, the Wagner Act and its state counterparts, it forms the keystone of nearly all modern labor organization in the tenure field.

Many people in the labor field in speaking of the Railway Labor Act tend to put the emphasis on the mediatory and arbitral provisions of the Act; indeed it has been called the "Railway Mediation Act." These provisions not only lacked novelty when written into the Act, but have been wholly insignificant in their contribution to labor progress. If the Act had been nothing more than a mediation act, it would soon have followed its several predecessors into well merited oblivion.

In point of fact, however, the Railway Labor Act remains to this day the high-water mark of labor legislation, not only because it introduced into American jurisprudence a great, new, and undiluted principle, but because the operation of that principle produced practical results unequalled by any other piece of labor legislation. Chief among these practical results were:

1. A reduction of the strike curve almost to the disappearing point.

2. Improvement of the moral tone of the twenty odd unions serving railroad employees to the point where the most serious charge that can be brought against any of them is "feather bedding"—a monument to their efficiency as labor unions.

3. Substitution of a businesslike approach to the personnel problems of the roads for the intemperate emotional approach common to unions in other fields.

4. An upswing in the membership and in the ratio of organized to unorganized units, far greater proportionally than that achieved in general industry after the passage of the Wagner Act by the A.F. of L., C.I.O., and independent unions combined.

These results did not come about through the interposition of some magic influence. Neither did they come about because of any saintliness peculiar to railroad employers and employees and denied to their brethren in general industry. They flowed with the certainty of effect following cause from the reasonable and undiluted principle which formed the kernel of the Railway Labor Act.

This principle was that employees of a particular employer have the right to organize themselves to select a representative with whom the employer is bound to deal respecting working conditions, provided that a majority of some group cohering according to some reasonable organizational principle concur in the selection. At that time, though not without precatory antecedents, it was a novel legal principle, but it has since become, in mutilated form, the mainspring of the Wagner Act and the several state acts dealing with the same subject. In its original form in the Railway Labor Act the implementation of the principle was cumbersome, but it was perfected by the addition of administrative election machinery in 1934.

Although consonant with the highest of American tradition, the principle was a radical one in the sense that it uprooted and discarded a social institution which had been fifty years in the building—craft unionism. This is a crucial fact—and it is a fact which few people—even those well versed in labor matters—realize even to this day. Public failure to grasp the fact accounts for no little of our present confusion.

Superficially, it would appear that the statement is erroneous, because in all its decisions delineating bargaining units the Railway Mediation Board has scrupulously followed craft lines and repeatedly declared that the craft was, historically, the proper organizing base of the railway industry. As this is written, the ink is hardly dry on its latest decision favoring craft organization.*

How then, can it be true that craft unionism has been discarded in the railway industry? The answer lies in the fact that very often the forms of a social institution linger on long after the substance has departed. Just as "Free and common socage" was the "Tenure" under which New Jersey lands were held in 1944 although the feudal system, which is the only system under which either "socage" or "tenure" has any real meaning, was no longer with us; so the "craft bargaining unit" lingers on in the railway industry although "craft unionism" has departed.

For we have seen that the primary reason for craft organization was the achievement of monopoly, which heretofore alone could guarantee a successful union. The Railway Labor Act not only made monopoly unnecessary, but positively forbade it. In destroying monopoly, it destroyed craft unionism. Let us see in detail how the indicia of craft unionism have been removed:

Closed shop—prohibited by the Act.

Employee consent—of the nonduressed variety.

Dual unionism—"double headers" tolerated and fairly common.

Union principal contracts—employee-principal contracts required by the Act although some parts of the older idea still remain.

Jurisdictional integrity—brakemen's contracts written by Conductors' Union; conductors' contracts written by Trainmen's Union.

*Subsequent to the preparation of the manuscript, the train service of the Western Maryland Railroad was organized upon the industrial plan.

Craft integrity—see *jurisdictional integrity*. Engineers are now in the Firemen's Union; firemen in the Engineers' Union.

Perhaps in no other way does the destruction of craft unionism appear so strikingly as in the two points last mentioned. For it is obvious that if the craft union no longer exists, then craft unionism no longer exists. It is equally obvious that, although a union may bear the name "Brotherhood of Locomotive Engineers," if its membership is no longer restricted to engineers but embraces the historically distinct craft of firemen, and if it tolerates invasion of the engineers craft by the Fireman's Brotherhood, and if it makes contracts indiscriminately covering firemen and engineers, it is no longer a craft union.

When we come to examine the Wagner Act, we shall find the same phenomenon. Here it is proper to observe, however, that we may find in the conduct of some A.F. of L. Unions with reference to the Wagner Act a confirmation of our observation that the elective principle destroys craft unionism. Originally the A.F. of L. unions almost unanimously favored the Wagner Act, hailing it as the Magna Charta of labor. Then it became apparent from lessons taught by the C.I.O. that the Wagner Act fostered dual unionism and A.F. of L. ardor began to cool. The craft unions then took up the cry that the Wagner Act should be amended to require separation of craft units for bargaining, failing to understand that it was not the "industrial" type of bargaining unit which was destroying craft unionism, but the elective principle, the very heart of the Wagner Act. An understanding of this latter fact is gradually coming to the A.F. of L., for now we see its components trying to limit the power of the N.L.R.B. to set aside contracts, suggesting suspension of the Wagner Act for the duration of the war and even outright repeal.

In demanding repeal of the Wagner Act the craft unions are wholly logical. They are doing the only thing which

will preserve them as craft unions in the tenure field. Monopoly and election cannot exist side by side, and if the law supports the social institution founded upon the elective principle, the social institution founded upon the monopoly principle must disappear. If the A.F. of L. had understood this in 1935, it would have blocked the passage of the Wagner Act. Fortunately for the public weal it was deluded by several factors, not the least of which was the overemphasis placed by the classical and the Marxist schools of economists on the antagonism of capital and labor into thinking that the Wagner Act was directed at the employer only, and supported the Act.

It must not be concluded from the foregoing that the craft bargaining unit has no rightful place in our present elective system. It still has its utility. But its modern utility is to furnish protection for the individuals of a craft group against the submergence of their interests to the profit of their fellow workers in a plant organized upon an industrial basis. The craft unit should remain, but we must build new law about it—law founded not upon craft solidarity nor craft monopoly but upon its modern utility.

In preserving craft lines to a degree, we must face the fact that craft unionism itself has departed from the tenure field. Hence we must be prepared to cast off the institutions proper to the monopoly organizing principle and replace them with institutions harmonizing with the elective principle. The process of discarding these old institutions is now proceeding slowly but surely; human institutions cannot long be preserved upon an illogical base; reason like murder, will out, and will either shatter the anachronism, reduce it to desuetude, or grind it down to the new specifications. If, however, we can by legislation harmonize the institutions with the new principle, we shall be spared much social turmoil and much legislation of the intemperate sort directed at specific evils without appreciation of the fact that most of the evils are merely symptomatic of the cancer of the old institutions upon the new

principle. The surgery should be directed toward the anachronistic institutions, not toward the specific evils.

We have seen what was uprooted by the Railway Labor Act and now turn to observe what was created in its place. In doing this let us not rush to the conclusion that because the Railway Labor Act has produced good results, all that is required is to extend the provisions of that Act to general industry in order to produce equally good results in general industry. The railroad industry furnished a relatively small and incomplete laboratory for the testing of the elective principle. The buffeting given to the Wagner Act by general industry was much more severe for the very simple reason that so many more people have been involved and the variety of their circumstances was so much greater than that which a single industry of rather homogeneous structure provided for the Railway Labor Act.

In addition, circumstances in the railroad industry made for a rather painless destruction of craft unionism. The limits of the crafts in any given labor market area (the organizing base of the craft union) tended to coincide, even in the back shop trades, with the bargaining unit (the organizing base of the industrial union). Therefore, the union was faced with no apparent change in its policy save that what before was obtained by threat of strike could now be obtained by election among the whole of the craft.

The Railway Labor Act, as has been said, introduced the elective principle of collective bargaining. That principle involves the setting up of legal machinery for

1. The prevention of clogs upon the right of the employee to select his representative.

2. The ascertainment of the will of the majority in the selection of the representative.

3. Enabling the selected representative to arrive at a contract with the employer.

The end result, superficially, was to be the same as the end result of unionism before the enactment of the

Act—a so-called “collective contract” settling the differences, for a period, between the employer and “labor.”

It so happened that in the railroad industry “labor” meant the same thing whether conceived of as “the craft” or as “the employees” because, as we have seen “the employees” of any particular railroad divided craftwise generally constituted “the craft” in the labor market area, and if a majority of “the employees,” who thus constituted a majority also of “the craft,” had the power to designate the representative, no confusion would result. There would be a distinction, but not a difference between “the craft” and “the employees”; the whole process became lucid and coherent, and industrial peace resulted.

If, however, this scheme of things is carried into general industry, the results will be entirely different. There, in most instances, “the craft” (and up to the time of the Wagner Act the union identified itself with “the craft”) and “the employees” were not only distinct but also different. Rarely did “the employees” constitute more than a fraction of “the craft.” It is evident then that there is opportunity for confusion in the end result unless the lawmakers sharply delineate the function of the union in the bargaining process by making clear whether the elective process is merely a key to let a union (craft) into an establishment to bargain for itself or whether the union (not the craft) is to be a true representative, subject in all things to the will of its electorate. This question was not at first answered by the Wagner Act and failure to answer it has produced, and is now producing, legal confusion and, as its sequel, industrial strife. The latter concept, however, because of its inherent soundness gradually is extinguishing the former. We shall deal with this subject in practical terms when we discuss the Wagner Act. Suffice it here to note the possibility for confusion and to explain its absence in the railroad industry.

The Act provided means for the accomplishment of the three steps:

1. It laid a prohibition upon both the union and the employer against clogging the right of the employee freely to select his representative. The clogs which were prohibited were, by and large, those acts which we now call unfair labor practices, although the language used to prohibit them was general. In addition to the clogs which are now recognized unfair labor practices, the Act also prohibited the closed shop, union shop, preferential shop, company collection of dues and maintenance of membership arrangements. There was no tribunal set up to administer the prevention and redress of clogs upon the elective process, so that enforcement fell to the ordinary courts acting not at the suit of the government but at the suit of the party aggrieved.

2. The Act provided a special tribunal to determine the scope of the proper bargaining unit, hold elections, and ascertain the representative.

3. The ordinary courts were vested with power to compel the parties to bargain. To aid the bargaining process there was provided a hierarchial system of mediation with compulsory "cooling-off" periods. Arbitral machinery was set up for those disputes which the parties would consent to have heard either by submission in the course of the dispute or by commitment anteceding the dispute.

The first step broke the back of craft unionism in the railroad industry, as the Wagner Act, years later, was to do in the tenure labor field of general industry. In the Railway Labor Act the break was thorough, clean-cut, and final because the prohibition against "union security" demolished the bulwarks of craft unionism—the closed shop, preferential shop, and union shop. The unions, hence, could no longer represent the craft as a craft; they were limited to representing particular groups of employees of particular employers.

Why did the Railway Labor Act prohibit union security? Apparently, simply because the framers recognized that union security was an invasion of the right

which they were bent upon giving to employees—the right freely to select their representatives. This was a simple and correct conclusion as applied to railway labor which was overwhelmingly tenure; it is also a correct conclusion as applied to general industry. It is not, however, a simple conclusion as applied to general industry where there is an undifferentiated mass of tenure labor and casual labor and where the prohibition of union security would utterly wreck all unionism in the casual field. The answer for general industry lies in making the differentiation, a matter to be examined later.

Here we must make the emphatic observation that just as we cannot have night and day in the same place at the same time, so we cannot have union security and employee choice in force at the same time respecting the same employees. Union security is intended to and does destroy the freedom of choice of the majority. If it does not destroy the freedom of choice of the majority, then it is of little value to the union.

A great deal of argument is heard on the point that the closed shop or union shop, while they have been abused, are not essentially vicious. What has been said in the earlier chapters furnishes ample grounds for the conclusion that at all times prior to the introduction of the principle of choice and even today in the casual field the closed shop is not essentially vicious. Nevertheless, it is an absolutely inescapable conclusion that in the tenure field, where the principle of choice is the fundamental principle, union security is inherently wrong. It is not merely subject to abuse, it is an abuse in itself, because its essential design is to abrogate the freedom of the majority of employees to choose their representative.

In the peculiar two-dimensional way in which this three-dimensional subject is discussed and decided in bargaining practice, the fact that union security is essentially wrong in the tenure field is often submerged. The employer argues that his right to hire and fire is being invaded;

the union, that its security makes a closed or union shop necessary. If the employer raises the question that the right of the employee is being infringed, he is properly told that such an argument should not come from his mouth, since he does not represent the employees. The union, on the other hand, does represent the employees, but in an argument of this sort its interests are opposed to the right of the majority to choose another union or no union at all. Thus the employees' rights are left to the disposition of the employer whose interests may well be presumed to be opposed to the interests of the employees and of the union which, in fact, is trying to perpetuate itself upon the employees by taking away their right of choice. This is a glaring defect of the Wagner Act—the fallacy of leaving to collective bargaining the question of the closed or union shop. This fallacy of the Wagner Act is not found in the Railway Labor Act, which removes entirely from the hands of the employer and of the union the right of choice of the majority.

So far we have rested our observation that the closed or union shop destroys the right of choice of the majority on the bare statement that these institutions are of little value to the union unless they do destroy majority choice. We shall later examine this premise in greater detail as respects other values claimed to lie in the closed or union shop. Here we confine ourselves to a practical exposition of the fact that the closed shop or union shop does destroy the choice of the majority. Although it would seem to be an obvious truth, the peculiar way in which the publicists of labor and of industry have angled the facts has led to a great deal of confusion, so that there is a broad section of opinion which conceives that the closed shop or union shop involves merely the extinction of the rights of a minority.

This section of opinion has made itself felt in the curiously irrational statute law of Wisconsin as a restriction of the "all-union shop" (closed or union shop) by which an "all-union shop" is prohibited unless approved by 75 per

cent of the employees. A good number of arbitrators also have followed some such percentage rule in awarding or refusing to award the closed or union shop. In so far as such rules can be rationalized, they appear to rest upon the assumption that the approval of an overwhelming number gives rise to the presumption that the union is a fit one to join and that the "holdouts" are unreasonable in not joining. It entirely neglects, however, the very basis upon which unions in the tenure field seek to justify the closed shop—the claim that it puts a curb on the power of the employer to oust the union by discriminating layoffs and discharges. If this claim be a true one, then the union that has only 51 per cent membership is the union that most needs protection, because it is much more likely to lose its majority and with its majority its right to represent the entire group. Thus the strong union is protected and the weak exposed.

It might also be mentioned that the smaller and weaker a minority is, the more it is entitled to protection whereas the aim of such rules is to wipe out the small minority but protect the larger one. Considered in this light, it harks back to a rather marked tendency in labor, *i.e.*, the tendency to sacrifice rights of parties in favor of industrial peace. It is obvious that a strike by 25 per cent or less of the labor force will be, ordinarily, rather futile, whereas a strike by a larger proportion, though less than a majority, might be effective.

This talk of the closed or union shop in terms of majority and minority tends to obscure the fact that under the closed-shop or union-shop arrangement the rights of the majority as well as the rights of the minority are destroyed and that, under the union maintenance arrangement, the rights of the majority are destroyed while the rights of the minority are being preserved—not in fact but in name. When we speak of rights in this connection, we are confining the term, of course, to the right to selection of representatives and are not referring to other rights such as the much

mooted "right to work," which has added its own brand of confusion to the chaos which enshrouds the closed shop issue.

It is readily discernible from the term "union security," which is lately being used to describe closed- and union-shop arrangements and maintenance of membership arrangements, that the union (not to be confused with the employees) by these arrangements seeks to be secured against some danger. Since the present law provides that the union shall be exclusive bargaining agent so long as it holds its majority, the union can be destroyed as bargaining agent only by the loss of its majority. The danger which the union seeks to avoid is this loss of majority either through "union-busting" tactics on the part of the employer or "raiding" on the part of rival unions or rejection by employees. Now, if the employer succeeds in weaning away only a minority or if the "raiding" union succeeds in convincing or coercing only a minority away from the original union or only a minority lose confidence, the bargaining agency is still safe. Therefore, the bargaining union is not injured until the majority is opposed to it. The incumbent union then seeks to guard against the contingency that it shall be opposed by a majority.

The device by which the incumbent union guards against this loss of a moral majority is the creation of a fictitious, legalistic, or "paper" majority. In the case of the union shop and closed shop, it does this by taking away from all employees the right to choose representatives; in the maintenance of membership arrangement, it takes the right away from its own members only and thus creates a bloc of paper memberships which give it some assurance of retaining a majority.

This device is compatible with the old principles of craft unionism, which, as we have seen, operates on the monopoly principle of organization for, under monopoly organization, the will of individual groups is subordinated, at least in theory, to the general will of the craft which

resides only in the union. Union security institutions, however, fly right in the face of the elective principle, because they attempt to produce majorities by artifice and not by choice.

The confusion in law and the number of labor disputes which result from this neither-fish-nor-fowl status of unions is considerable. The amusing efforts of the War Labor Board to chart a rational course on the union security issue illustrate the legal confusion. Between the Scylla of preserving the right of the individual to choose, as part of the bargaining integer, his representative, and the Charybdis of keeping the union as such in the capacity of representative against the majority will of the bargaining integer, there is obviously no water; consequently the War Labor Board (through no fault of its own) backs and fills, tacks and comes about, and compromises now with one principle, now with the other, and satisfies neither. In attempting to square the circle, it adopts maintenance of membership, a device with all the defects and none of the virtues of the closed or union shop; then it institutes an escape period at the beginning of the term; then it commences a swing toward an escape period at the end of the term; then in some cases it abolishes the "right" of escape altogether; and then it investigates union responsibility, first from the viewpoint of obtaining unions sufficiently strong to control the employees so that they will not strike and then from the viewpoint of regulating unions so that they shall be democratic, which means that the employees shall control the unions.

The actual labor disputes arising out of this very fundamental conflict between the new elective-agency principle and the old craft-union monopoly tradition, which have been permitted to coexist, are numerous. Employer resistance to the closed shop was given new impetus by the introduction of the elective principle, for they were thereby able to show a logical reason for opposition; opposition to the closed shop, which, in Gompers' time,

as he truly said, was opposition to all unionism, became perfectly compatible with the new unionism. It had now become "absurd to consent to" elective "organization of labor and to deny its logical result," the open shop (note the change in meaning of the term "open shop"). Unions were spurred to renewed efforts to obtain the closed shop by the dual unions made possible by the elective principle. The nonincumbent competing union could now appeal to employees on the ground that theirs was the right to choose, but when successful would promptly embrace the monopoly principle to assure itself that the employees would not be permitted to use their right of choice to oust it at some later date.

The lack of reason in this double-headed scheme of things is well illustrated by the Kaiser shipyards case, which led up to the passage of the Frey Amendment by Congress. Kaiser, in organizing his shipyards, went to the logical source from which to obtain the type of mechanic he needed for commencing his operations—the Metal Trades Department of the A.F. of L. He signed, as the law presumably permitted him to do, a closed-shop contract for the duration of the war. When the yards were fully staffed, the C.I.O. instituted an organizing campaign and claimed it had secured a majority, which, for our present purposes, we shall assume to be the fact. It then commenced a proceeding before N.L.R.B. to have the closed-shop contracts set aside on the ground that they were unfair labor practices, since they were not made with the majority representative. While this proceeding was pending, Congress passed the so-called Frey Amendment, obviously designed to control the decision in this particular case, but actually worded so as to sanctify all contracts in force for three months.

Here we have as black a picture as might be imagined of the destruction by the closed-shop or union-shop route of the rights of the majority. If the claim of the C.I.O. is true, it is the majority union, yet a minority union holds

the bargaining rights. One might expect the C.I.O. to roar at the injustice of the situation. This it cannot do, for it is itself committed to the closed-shop principle. It is reduced to an absurd and perplexed little pipsqueak that Kaiser knew when he signed the A.F. of L. contract that the bargaining unit would be enlarged. No mention of the great principle of employee choice, no dwelling upon the rights of the employees; it is reduced to a mild criticism of Kaiser for doing what a man needing skilled craftsmen would normally do—go to the A.F. of L.

As for the Frey Amendment, while legislation passed to accomplish a result in a particular case is to be deplored, what other fault can be found with it, by our current mores? Is it more evil for Mr. Kaiser and the A.F. of L. to freeze the majority out of its rights than it would be for Mr. Kaiser and the C.I.O. to do the identical thing by executing the closed-shop contract, which the C.I.O. would unquestionably have demanded? If the C.I.O. had been successful and had secured a closed shop on the basis of the inflated work force, it certainly would have insisted on its contract rights in the event that the majority later swung to the A.F. of L. How, then, can it validly complain of an A.F. of L. contract or even of an independent contract in another case?

The Railway Labor Act, however, escaped such folly. Since the prohibition of the restraint upon the will of the majority is the only substantial difference between the organizational features of that Act and the Wagner Act, it is at least a fair though not a simple inference that some part of the success which attended the Railway Labor Act is the result of that prohibition.

Simply in order to keep our minds clear upon the subject it may here be mentioned that we have not fully examined the union security idea; there are other phases of it which demand attention.

It should also be noted that none of our observations to this point discloses any vice in the "preferential shop,"

an arrangement whereby hiring is restricted to union men without any continuance of membership being guaranteed by the employer. Nor does anything we have said reflect upon the use of the closed or union shop merely as a dues-collecting medium. In so far as it prohibits dues collection, the Railway Labor Act goes beyond what is necessary to preserve the integrity of the elective principle. As a matter of fact we shall later see that the logical consequence of the elective principle is the collection of dues from all in a unit, regardless of union membership.

The other aspects of the Railway Labor Act, *viz.*, the improvement of the moral tone of the unions, the promotion of businesslike modes of procedure, and the increase in union membership, we reserve for later discussion.

CHAPTER VII

THE CORPORATE STATE

The corporate state in its short life from the beginning of the Roosevelt Administration in 1933 to the Schechter decision in the middle of 1935, generated currents which still contribute to the confusion of the labor scene. Paradoxically, the seeds of the Wagner Act were nurtured in the ground of the National Industrial Recovery Act and, though the latter has been erased from the statute books, the ideas remain to sour the fruit.

The paradox, though a hard, cold fact, was not appreciated in the days of the N.R.A. It is not appreciated today by those who propose a return to the corporate principle. Without passing on the merits of either the corporate principle, as embodied in N.R.A., or the principle of the Wagner Act, it must be made crystal clear that the two principles are repugnant; that we may have one or the other, but we cannot have both without intolerable confusion.

We must examine briefly the fundamentals of the corporate principle as it applies to unionism. This succinct description appears in *Quadragesimo Anno*:

The state grants legal existence to the syndicate or union and thereby confers on it some of the features of a monopoly, for in virtue of this recognition, it, alone, according to the kind of syndicate, can represent workingmen and employers, and it, alone, can conclude labor contracts and labor agreements. Affiliation to the syndicate is optional for everyone; but in this sense only can the syndicate organization be said to be free, since the contribution to the unions and other special taxes are obligatory for all who belong to a given trade or profession, whether workingmen or employers, and the labor contracts drawn up by the legal syndicate are likewise obligatory. . . .

The corporative organizations are composed of representatives of both unions (*i.e.*, of workingmen and employers) of the same trade or profession, and as true and genuine organs and institutions of the state they direct and coordinate the activities of the unions in all matters of common interest.¹

This was the objective of N.R.A. Essential to this scheme of things were

1. Unions of the monopoly type.
2. Trade associations, also of the monopoly type.
3. Sovereignty of the unions and trade associations within the natural economic sphere of each, and cosovereignty in the common concerns of both.

The system had been evolved under European conditions to minimize the class warfare which was the scourge of many Old World countries, notably Italy. Its primary idea was to unify the employer class and the employee class by binding them together into a vocational group. Hence the symbol of the fasces, from which we derive our lately opprobrious term "Fascist."

The system has taken several different forms. Mussolini had imposed it upon Italy, taking that unfortunate country at a time when the social and economic effects of class warfare had reduced it to chaos; compared with the chaos which it supplanted it was a blessing. Being an imposed system, it suffered from the necessity of complete political control (an evil noted by Pius XI) which tended to engulf the functions of the corporations and ultimately supplanted them.

On the other hand, Salazar, having the wisdom to recognize that it is impossible to impose an economic system upon a people without total political control, took the course of voluntarism and merely provided the legal conditions under which the vocational groups would have an incentive to form and function. But the path of voluntarism is a long one, and to this day the Portuguese system

¹ Translation published 1938 by the America Press.

is only partly corporate and nascent as to those parts which are corporate.

Roosevelt, and even Roosevelt and Congress together, could not achieve the complete political control which enabled Mussolini for so long to hold together a corporate economy. Roosevelt could not take the long path of voluntarism, as Salazar has done, because Roosevelt had taken office under what he rightly considered to be a mandate to do something—and do it quickly—to alleviate the effects of the depression. He therefore attempted to steer a middle course. Procuring from Congress as much political power as possible through enactments which were later described as “delegation run riot,” he adopted a sanction, the “Blue Eagle,” which retained the appearance of voluntarism. The result was a system which tottered from its birth to its death two years later at the hands of the Supreme Court, which held void the grant of political power.

It is perhaps significant that Mr. Roosevelt, noted for his persistence in attacking and flanking judicial restrictions, never attempted to resurrect a general corporative scheme, but thereafter took up the language of class warfare—economic royalist, Tory—and thereupon somnolent Communism came awake. It is noteworthy that a corporative scheme, the Guffey-Vinson Act, ultimately passed judicial scrutiny but was allowed to die in 1944 without any great effort on the part of the Administration to procure a renewal, which was in marked contrast to the original Administration request that Congress enact the scheme despite constitutional doubts.

Our chief concern is the interaction of N.R.A. and the labor movement. Unions as the public knew them then had to be monopolistic. The American union of that day, therefore, dovetailed nicely into the corporate pattern, which called for monopoly unions. Dual unionism was pretty much inconceivable. Craft unions conceived of themselves as representing the interests of the entire

craft in any event; therefore, if they sat upon code authorities they would merely be given the legal complement to what they considered to be the social fact. The deep chasm between the industrial and the craft organization was not appreciated, nor, indeed, was the necessity of industrial unionism to the corporate structure appreciated. Closed and union shops were the only secure organizing method, and the corporative system would, it was thought, merely amount to industry-wide closed or union shop.

One other colossal misconception, understandable enough, and still current, underlay the thinking of most of those who espoused the N.R.A. and especially the labor men who espoused it. That misconception was that the American economy was a class economy. Adam Smith and Karl Marx had so long occupied the minds of economic thinkers that it was perfectly natural that their division of persons into warring camps labeled "capital" and "labor" should obscure the fact that America had very little class consciousness. The description of the American laborer as "a capitalist without money" was very much nearer the truth. American economy tended to be integral rather than divisive as is amply shown by the limited success of socialism in constructing political parties.

Out of this misconception arose an erroneous operating assumption on the part of the then leaders of labor, *viz.*, that since all laboring men had a common cause all should unite and that, if employer pressure against unionization were removed, all would unite, chiefly under the waiting banners of the A.F. of L. As a matter of fact, the chief opposition to unionization at that time was among the employees themselves.

This employee opposition is amply demonstrated by the fact that, even today, with almost every legal and practical card in the hands of organized labor, the nominal percentage of union members among the working force is much below that achieved before the war in England and Sweden, and the probability is that the percentage of sound

unionization, *i.e.*, really loyal union members, is much lower. While the reasons for the opposition cannot be charted with any exactness, they were no doubt complex and involved in part the following elements:

1. A general objection to the element of coercion implied in the monopoly-union organization.

2. In the tenure field, a consciousness that the welfare of the individual employee was more closely bound up with his individual employment and that of his fellow employees, than it was with the interest of the craft or industry as a whole, which consciousness made craft and industrial unionism as those institutions then existed unacceptable to him.

In the Italian scheme of things the first of these objections had been answered by prescribing a single official labor organization and the second was met by making each of the official labor organizations follow industrial rather than craft lines. This, considered apart from other elements in the Italian state, was not undemocratic; it merely prescribed an industry-wide bargaining unit and fixed the mode of selecting representatives for that unit. But the unit thus constituted became an official organism.

In this country, however, the theory apparently was that if the private organisms, the unions, could be put in such a position that they became truly representative of an industry, they could be made to perform the functions of the official organisms created in Italy. It was falsely assumed that all that was keeping the unions from becoming the representatives of substantially all employees was employer pressure against organization. The N.R.A. therefore provided

That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives . . . [and] That no employee . . . shall

be required . . . to join any company union or to refrain from joining or assisting a labor organization of his own choosing.

The social effect of this declaration was practically nil. Employees did not join unions merely because their employer was prohibited from interfering with them; the fact is, as any experienced organizer of today can testify, that the greater the employer pressure, the better the chances of organization. More was required to activate organization; employees had to be interested in unionism.

The legal devolution of the declaration is, however, startling in retrospect. Just as, some centuries before, the adherents of feudalism had passed the statute *Quia emplores terrarum* to bolster a tottering feudal economy, only to see the statute utilized to furthering a mercantile economy, so the adherents of corporatism and craft unionism were to see the labor clause of N.R.A. so used as to render corporatism unattainable and craft unionism practically a dead letter in the tenure field. To see how this occurred, it will be helpful to start with a concrete illustration of what the proponents of N.R.A. hoped would occur.

Perhaps the closest approach to the Italian model achieved in this country is in the garment trades. There two powerful unions, each substantially unchallenged in its respective field, each organized on an industry-wide basis (though there are separate crafts recognized within the union) deal with employers organized for the most part into trade associations. The *sine qua non* of contracts is the closed shop. Characteristic of the trades is a great concern over subjects not generally dealt with in collective bargaining but related to the quantity and quality of production, distribution, and the general welfare of the industry, *e.g.*, regulation of contract work; differential wages for different selling prices. One of the unions has occasionally gone so far as to make substantial loans to manufacturers and has done extensive research work for the general trade interest, covering such subjects as raw-

material production and problems of manufacturing and marketing, subjects somewhat removed from the usual concerns of labor unions. The other union maintains such close relationship with the employers that it has been the subject of investigation by the U.S. Department of Justice under the antitrust laws.

This is the sort of cartelized economy envisioned by the corporate state. Production and distribution, wages and profits are to be regulated by "the industry" composed of employers and labor separately organized. "The industry" is to be exempt from antitrust laws, but the regulations governing "the industry" are to be subject to state approval for the protection of the consumer. Production is to be scheduled to fit the demand and to maintain a high level of employment. In turn, demand is to be maintained by the high employment level.

How far any such general scheme is feasible in the intricate economy of America is open to serious question. Even in a much simpler economy, that of Tudor England, organized, in so far as it was industrialized, upon a somewhat similar basis, it was found necessary to maintain demand by ordering customers to buy the products of industry. With an economy such as ours, characterized by rapid technical changes and sudden diversions of the public taste from one line of merchandise to another, it would seem well-nigh impossible.

In specialized situations in this country, however, there are distinct tendencies to corporatism. The casual trades, such as the building trades and some fungible goods industries, such as coal mining, exhibit marked tendencies in that direction. So do some seasonal industries, *e.g.*, the garment trades, already mentioned, and some industries on the down grade, such as the late hand blown window-glass industry. But the application of corporatism as a generalized economic system to the American economy is a task to stagger the imagination; and the hopeless confusion which was N.R.A. is ample proof of the fact.

We are not so much concerned with the general economic aspects of the corporate system as with its labor aspects. The labor clause of N.R.A. was designed to foster the monopoly unionism essential to such a scheme, and the operation of each industry was to be an extended version of the situation in the garment trades. It was assumed that this situation would result once the power of the employer over the choice of his employees was destroyed, but, as we have observed, this result was not achieved.

However, the N.R.A. gave a legal right to employees to be represented by organizations of their own choice. The first snag encountered in the devolution of this legal right was in a case in which an A.F. of L. union was opposed by a one-plant union. The Administration, cleaving very literally to the wording of the N.I.R.A. decided that the adherents of the A.F. of L. were entitled to be represented by the A.F. of L., while the adherents of the independent union were entitled to be represented by the independent union. The decision was soon found to be impractical for all purposes, for with two groups, autonomously organized, but constituting part of a functioning unit wherein working conditions had to be homogeneous, it was impossible to make a satisfactory contract or even to settle individual grievances. What particularly stirred the Administration, however, was that the A.F. of L. in a short time lost its membership, leaving the one-plant union victorious.

It is perfectly obvious that the one-plant union is incompatible with corporatism; it destroys the industry-wide labor representation which is one of the two cornerstones of corporatism. So, taking into consideration the impracticability of dual unions representing parts of a homogeneous group, the Administration finally decided that there should be but one representative, and that the representative should be the one selected by the majority of employees concerned.

Here again it was conceived, and again erroneously,

that the corporative idea would prevail, for it was expected that only scattering minorities would be found to select one-plant unions or to reject the A.F. of L. But the administrative difficulties which had plagued the corporate state from the beginning had made necessary new legislation to cut red tape and consolidate dispersed authority in the enforcement of the labor clause, and that new legislation, the Wagner Act, enshrined the majority rule in our law.

Just as the Wagner Act cleared the Congressional committees, the Supreme Court put an end to the corporate state. The Act, however, became law shortly thereafter, the posthumous child of corporatism.

Again the expected increasing and multiplying of union members failed to materialize. From 1935 to 1937, while much organizing was afoot, the concrete results were small. An explanation of this phenomenon widely accepted is that uncertainty as to the constitutionality of the Wagner Act was holding back organization, but such an explanation seems rather shallow, if only for the reason that it assumes a cowardice among American workers which belies this author's observations. True, the court decisions sustaining the Wagner Act played a part—and an enormous part—in the organizational surge which ensued, but the role of the Supreme Court was more the role of a press agent than a protector of labor; the tremendous publicity which followed the decisions brought to notice the fact that here at last there was a rational basis provided for the organization of tenure labor. The same result might well have followed even if the Court had struck down the Wagner Act. Civilizations are not manufactured in courtrooms.

To comprehend fully what took place immediately following the judicial vindication of the Wagner Act, it is necessary to observe a quality of unionism which we shall have occasion to examine in other aspects later on. This quality we shall call "introversion" and its opposite "extro-

version." An introvert union is one whose activities are directed primarily toward improving the wages, hours, and working conditions of particular employees of a particular employer and is interested only to a minor degree, if at all, in the circumstances of employees of other employers in the same industry or craft and only to a minor degree, if at all in conditions in the industry as a whole. Extrovert unions are those which are interested primarily in the welfare of the generality of employees in the industry or craft and in the welfare of the industry or craft as a whole, and, although there is necessarily involved in this primary concern the welfare of the particular employees of each employer in the industry or craft, concern for these particular employees is distinctly subordinate and secondary to the welfare of the whole group.

The typical union of the introvert type is the one-plant union; the typical union of the extrovert type is the craft union. A craft union in the casual field is of necessity extrovert, and although the organizational necessity in the tenure field is not quite so pressing, the craft union, originating in the monopoly theory, is strongly extrovert. Thus we find that one wage scale applicable to all employers is common in the printing industry and this institution of the common wage scale is the hallmark of extroversion.

Industrial unions, on the other hand, may be either introvert or extrovert. Extrovert industrial unions are found chiefly in the fungible goods industries, of which coal mining is the prime example. Extroversion in coal mining produced the now famous face-to-face wage payment practice and was responsible for the settlement of the portal-to-portal issue not on the basis of the actual travel time to the face, but on the basis of a travel time allowance, common to all mines, based upon a calculation of the average travel time in all mines. Most of the mine union litigation which has reached the Supreme Court arose out of extrovert activities of the United Mine Workers.

Most industrial unions are, however, decidedly intro-

vert, and this is true whether or not they are affiliated. With few exceptions the newly formed units of the C.I.O. are introvert, and the bulk of the increase in A.F. of L. membership is made up of introvert unions or units. The contracts of these unions contain disparate wage scales, based more on the circumstances of the individual employer than on conditions in the industry; they tend to perpetuate rather than to abolish wage differentials, and their main interest in other sections of an industry is to use those other sections as levers to raise up conditions in the particular shop with which, for the moment, they are concerned.

Our reason for advertng to the subject of introversion at this point was to observe that the Wagner Act provided a rational basis for introvert unionism and that tenure employees generally found introvert unionism acceptable to them, where extrovert unionism had failed; and that therein lay one of the major reasons for the increase in union members following the passage of the Wagner Act.

Before going into this point further it would be well to turn aside to notice some other aspects of introvert unionism. The most important of these other aspects is that introvert unionism is absolutely fatal to any corporative economy. For a corporative economy must rest upon the regulation of production and of price throughout the industry; and a species of union which curtails its activity at the point of mere single-shop collective bargaining and leaves solely to management the regulation of the general economics of a business is obviously destructive of the corporate organism.

This fact serves to explain the marked antipathy of the N.L.R.B. in its early days to one-plant unions, for a one-plant union was necessarily introvert, while the corporate state, of which N.L.R.B. was the child, required extrovert unions, which must needs be affiliated. On the face of the Wagner Act considered alone, the antipathy was unjustified; but, reading the Wagner Act in the light of

what its framers expected, it would be strange not to find such antipathy. In its early days N.L.R.B. clove closely to corporatism, even indexing its decisions not to points of law, but to specific industries, *e.g.*, "Textile Industry," "Petroleum Industry." The antipathy has moderated and its chief vestige at the present time is that a charge of "company domination" filed against an A.F. of L. or a C.I.O. union will not be entertained. Even the vestige is somewhat nominal, for almost the same result is achieved by labeling the acts complained of "interference, restraint, and coercion."

The second aspect which must be observed is that while to be extrovert, a union must be affiliated (or maintain some sort of liaison with other unions), a very large number of affiliated unions are in fact introvert. Affiliation of unions takes place for many reasons, *e.g.*, to obtain competent leadership and representation and to obtain aid in labor disputes; but unless the reasons for affiliation involve a design to regulate conditions in the industry as a whole and to standardize industry practices at least with regard to labor, the union is introvert.

Care must be taken to distinguish extroversion from mere affiliation for the purpose of political activity. Care must also be taken to distinguish the declarations of unions indicative of extroversion from the operating facts of the unions; for example, the C.I.O. 1944 policy favors a corporative economy (despite Communist leanings of some of its leaders), but most of the C.I.O. locals are in fact operating as introvert unions.

To return to the historical thread, the situation in 1937 was that at the precise time that a rational legal foundation had been laid for introvert industrial organization, an organization, the C.I.O., capable of organizing labor along introvert industrial lines, appeared. The resulting surge of organization, aided by the wide publicity attending the Supreme Court decision became an avalanche when the A.F. of L. was forced into rivalry and it became apparent

that an employee actually had a freedom of choice and the opportunity to exercise it.

The well springs of the labor organizational surge of the late thirties were twofold:

1. A deep seated response, more spiritual than material, to the recognition of human dignity implied in the scope given to the free will of the workingman by the Wagner Act.

2. Introvert industrial unionism.

Economic facts were, no doubt, in some part a conditioning element in the organizational surge, especially in the low wage spots. But the premise of economic determinism—of class division—that had loomed so large in the calculations of the sponsors of the Wagner Act and of the corporate state was false and the results showed it to be false. Economic determinism could not tolerate dual unionism nor one shop unionism, but the Wagner Act did produce dual unionism and one shop unionism. Economic determinism could not tolerate introvert unions—but the Wagner Act did produce introvert unions.

While the conclusion that freedom of choice as such was responsible for much of the organizational surge rests largely upon the author's personal experience, there is some evidence of an objective character available. One such item of evidence lies in the very fact that employees displayed such great interest in elections both on the affirmative side and on the negative side. Another lies in the wide acceptance of the elective principle by management itself, which, however much it may quarrel about details, has never assumed a general position in opposition to that principle.

The evidence supporting the conclusion that the institution of introvert industrial unionism was responsible for the organizational surge is overwhelming. The character of the unions which made up the increase in the total union membership is dispositive of any contrary argument. Craft unionism had succeeded in some special cases;

extrovert industrial unionism had succeeded in some special cases, but in the tenure field neither had been found to appeal to the generality of employees. It remained for introvert industrial unionism to provide the base for the organization of tenure labor.

There are no doubt some who will identify introversion with selfishness. Assuming the truth of the charge, there is little that can be done about it, for tenure labor is organized in that fashion. But introversion is not necessarily an indication of selfishness. It may be, and probably is in this case, an indication that the practical mind of the American working man directs itself to the correction of the immediate evils evident in his direct relationship with his fellow employees and his employer. The case for extroversion usually appears to him as a thing involving form without substance, *i.e.*, as a proposal for industrial regulation without substantive principle to guide the regulators and without a concrete and common end to be attained. In those cases where extroversion has had a special substantive goal, *e.g.*, coal marketing, extrovert organization has developed, but where the concrete substantive end has been more nebulous the adjective extrovert form has not been successful.

Such a result is to be expected. Considering the complexities of American economic life and the vast differences between employers in the same line of business, it could hardly be otherwise. The conclusion that the welfare of the individual is more closely bound up with the state of his employer than with the state of the industry or the economic state of all industry is easily made; the converse conclusion is made only when the special circumstances of a particular industry make it painfully apparent.

Consequently, that type of union which eased the chafing between the employee and his employer was accepted, while that type of unionism which concerned itself with industrial conditions generally and with wealth distribution was rejected. Further following of corporate

concepts became impossible; the Wagner Act had accidentally killed its parent—the corporate ideal. The extrovert union required by the corporate scheme could not be based upon freedom of choice.

For freedom of choice and monopoly cannot coexist; where one exists, we cannot find the other. Where the law encourages one, but permits the other, the result can only be chaos. The Wagner Act sought to do precisely this, and the result was not the advertised prospective result of labor peace, but a tremendous upswing in the strike curve particularly in strikes for organizational purposes. That the revered and practical author of *Quadragesimo Anno* clearly saw that such a result would follow a commingling of freedom and monopoly is evident from the quoted passage; although a good many of his professed interpreters have missed the point.

There is a school of interpretation of *Quadragesimo Anno* which, lacking the clear vision of Pius XI, hopes to achieve the corporate result through the following steps:

1. Expansion of A.F. of L. and C.I.O. by the closed shop method until organization in each industry is substantially complete.

2. Merger of A.F. of L. and C.I.O.

The members of this school fail to see that the adoption of the elective principle as embodied in the Wagner Act forecloses the possibility of any such chain of events. The basis of power has been shifted out of the industry (or union) as an integer and into the employees of each employer as integers. The situation is comparable to that of the United States under the Articles of Confederation—and the result will be the same condition of chaos. A merger of A.F. of L. and C.I.O. would not erase dual unionism. A new alignment of shops would soon recreate dualism.

The ties that bind the introvert union to one employer are stronger than the ties that bind it to other unionists

in the industry. Our present dualism is the result of and the proof of this fact, and there is no reason to suppose that extroversion will succeed when its past record is one of failure. Nor will the closed shop as that device is altered by the Wagner Act permit expansion to the limits of an industry; for a closed shop conditioned upon the will of the majority in a particular tenure labor shop is an illusory bond.

Another error common to this school is the tendency to subordinate the fact that in the corporate scheme the union becomes an organism of the state. This is no mere addendum to the scheme; it is essential. Private monopolies are not to be tolerated; the monopoly is justified by the official character of the organism and only those monopolies are justified which have such character. So long, then, as unions are private institutions, their monopolistic activities, *e.g.*, closed-shop or closed-membership books can draw no justification from *Quadragesimo Anno*. This does not mean that there is no justification for specific monopolistic practices but merely that permitting private monopolies on the theory that they are consonant with corporatism is erroneous.

With the general economic theory of corporatism we are not concerned. With the relationship of labor to corporatism we are concerned, and concerning that relationship the following conclusions may be drawn:

1. No corporate system can permit employees a choice of labor organizations nor of the form of organization. The maximum scope permitted by corporatism to employees is limited to a choice, mediate or immediate, of the persons who shall be officials of a monopolistic, legally prescribed political organism designed to represent workers in an industry as a class.

2. In American life, as it is presently constituted, no corporate system can be evolved because freedom of choice, save in the casual trades, the fungible goods industries

and some few other industries, breeds introvert industrial unions, and introversion will prevail because it deals with tangibles.

The indicated first move of those who espouse corporatism is, thus, the repeal of the Wagner Act, the Railway Labor Act, and all legislation enacting freedom of choice into our law.

CHAPTER VIII

THE WAGNER ACT— GENERALLY CONSIDERED

Fundamentally, the enactment into law of the principle of freedom of choice for employees is a comparatively simple matter. Logically, the principle has a negative aspect which involves the prevention of conduct which tends to destroy the right or render its exercise ineffectual, and an affirmative aspect, which involves the assertion of the right by the choice of representatives and the exercise by the selected representatives of the employees' right to make collective contracts regulating the incidents of employment. To these the law must add machinery for administering each aspect.

We discuss first, at the risk of burdening the reader with a purple patch, a matter dealing chiefly with administration. The importance of the matter extends much beyond the labor field and into the field of general law. It bears discussion here, however, because in any amendment of the labor law it should be taken into account and because it has not received much public notice.

The matter concerns the redress of an employee for wrongs committed against his right of choice, such as discriminatory discharges. In fashioning the Wagner Act, its framers, in all likelihood unwittingly, so treated this matter as to place upon the statute books one of the most vicious pieces of legislation ever enacted in America. How this came about needs explaining.

For some years prior to 1935 there had been growing up among legal writers and members of the bar a cult devoted to administrative law. Now the term "administrative law" has several meanings and its devotees do

not always distinguish its various meanings nor outline clearly to which meaning they are devoted. The first meaning of the term relates to the personnel charged with administering a particular segment of the law and performing functions largely of a judicial character in so doing. If the personnel is in the executive, rather than the judicial, branch of the government, if they are, in substance, judges without robes, their field of administration is said to be "administrative law." Workmen's Compensation Commissions are examples of this meaning of the term. In this sense of the term "administrative law" is wholly innocuous.

A second meaning of the term relates not so much to the personnel who administer the law as to the function of the personnel. In the present highly complex society, it is impossible for legislative bodies to set upon the statute books laws sufficiently detailed to furnish reasonably reliable standards of conduct for citizens. To overcome this difficulty there has grown up the device of enacting a general principle into a statute and creating a board or commission to set the actual standards of conduct in specific cases within the limits of the general principle. It is impossible for Congress to catalogue and prohibit all the classes of acts which might be deemed to be "unfair trade practices"; it therefore, creates a Federal Trade Commission with power to declare in specific cases what shall be deemed to be an unfair trade practice and with power to prohibit the continuance of such practices. The use of the term "administrative law" to describe this device is common, although, on close inspection, it will be found to be a contradiction in terms, since the board or commission actually does not administer an existing law but makes the law or standard of conduct. "Anarchy plus a constable" more nearly describes this device.

This device is unfortunately necessary in modern society. It is not, however, vicious, provided that certain safeguards are observed, among which are a rather definite limiting principle to which all its acts must conform and the con-

fining of its acts to compelling a citizen to observe, not in the past but in the future, the standard which it sets for him. Thus it is perfectly proper for the Federal Trade Commission, after investigation, to prohibit the marketing of a "Champagne" which is not made from grapes grown in the Champagne wine district of France, unless some qualifying word such as "Domestic" be used, but it is not proper to permit it to prohibit the marketing of "Domestic Champagne" altogether, if the wine has the physical characteristics of a Champagne wine and the purchaser is not deceived as to its origin. Nor is it proper to permit the Federal Trade Commission to penalize a citizen for having, before its determination, marketed a domestic wine as "Champagne" because his standard of conduct had not yet been set for him. "Champagne" is a word which might have described a wine of certain physical characteristics or a wine made from grapes grown in a certain locality. If the Commission, after investigation, found that public acceptance of a "Champagne" was based upon the "locality" idea rather than on the "physical characteristics" idea, then it could establish the standard of conduct, but until it did so, it would be unjust to penalize the merchant.

The third sense in which the term "administrative law" is used relates not so much to personnel nor to function as to the supremacy of the executive over the law itself. It is *le droit administratif*, the doctrine of ministerial absolutism of the Civil Law countries which has made Continental Europe and Latin America a civil shambles for generations. Under this doctrine the government is not subject to the law; it is free to disregard the law, and the citizen is powerless to control it so as to secure his rights. The rights of a citizen then are reduced to mere privileges, since they rest not in the security of the law itself but in the changing policy of the executive. Needless to say, this type of administrative law, if it can be called law, is wholly vicious. The fact that the contrary doctrines, due process and equal protection, have prevailed in common-law countries goes

far toward explaining the relative domestic tranquility of those countries.

Now when the Wagner Act was aborning, administrative law had reached a new high mark in America in the shape of the code authorities of the N.I.R.A. Under the N.I.R.A., in addition to, or as branches of, code authorities, there were more than forty administrative agencies dealing with labor. To bring order out of the resulting chaos and to solve certain other administrative difficulties a new labor act had to be fashioned. The framers of the Act looked back to a successful application of administrative law (in the second sense), the Federal Trade Commission Act, and adopted the administrative scheme they found therein.

In this adoption of the Federal Trade Commission procedure as the vehicle for furthering the right of employees to organize and bargain collectively, legal science reached a new low. Lawyers and courts and the N.L.R.B. itself are still trying to puzzle their way through the irrational maze that resulted. Worse, legal confusion in this field results in strikes, and the number of strikes resulting from the artificial procedure thus developed has been considerable.

To trace the legal absurdities involved in this procedure belongs to a more ponderous work. The reason for the absurdities, however, is very clear and it is that the kind of right enforced by the Federal Trade Commission is utterly different from the kind of right enforced by the N.L.R.B. The right enforced by the F.T.C. is not a personal and individual right; it is a right which resides in no specific person; it is the right of the people of the United States to markets free from restraints, monopolies, and deceptions. Although complaints proffered by competitors are acted upon by the F.T.C., it is not the competitor's interest that is to be protected, but chiefly the consumer interest and the general trade interest. Complaints of consumers are also acted upon, but relief is not given to the consumer as such; if he has been deceived or otherwise damaged, his remedy is to go to the ordinary courts and sue

for damages or injunction; all that the F.T.C. will do is to order a discontinuance of the obnoxious practice, not in the interests of the complainant but in the public interest. The right resides in the public; and the remedy resides in a public agency which may act or decline to act as it pleases. This is wholly compatible with legal science.

On the other hand, the Wagner Act states that "employees shall have" certain rights. It recognizes that the rights involved reside not in the general public but in certain individuals. Even if the Wagner Act did not proclaim the fact that the rights of employees reside in employees, it is impossible to imagine them as residing elsewhere. The right to be free from discriminatory discharge rooted in union activity, for example, can belong only to an individual person who is employed. To be sure, there is a public interest, and a grave one, involved in seeing to it that the rights of working men are protected, but that does not change the ownership of the rights; they are still the rights of the employee.

Now the enforcement of a right which resides in the public generally is vastly different from the enforcement of a right which belongs to an individual. In the case of a public right, there must always be some public official, usually an attorney general, district or county attorney, or corporation counsel in whom is vested the duty to determine whether or not the right of the public, if threatened or violated, should be enforced. If he fails in his duty, no particular individual is injured and the public has the press and the ballot box to protect it. On the other hand, where a right belongs to an individual, reason demands that the law give him the means for its enforcement. This is the historical and correct doctrine of the law and is recognized as part of the concept of due process. Wherever the law recognizes a right and does not give the owner a remedy, it is patently unjust.

Some violations of law involve both public and private rights. In such cases the law gives a remedy both to the

public and to the injured citizen. Under the Sherman Act, for instance, a monopoly may be suppressed by the federal prosecutor, but an individual injured by the operation of a monopoly may recover damages and at the present time may also sue for its suppression.

The framers of the Wagner Act, as has been said, adopted the F.T.C. procedure, ignoring the essential difference between private rights and public rights. The result was a fantastic scheme of things under which an apparent right was given to the employee but the remedy for violation of that right was given to the government as represented by the N.L.R.B. and no remedy at all was given to the injured employee.

The practical result is that an injured employee cannot, if the N.L.R.B. declines to hear his case, secure redress for his injury. Under other laws involving private rights, if the agency having jurisdiction declines to hear the case, the courts will order them to hear it. If the agency happens to be a lower court, the upper courts will require it to adjudicate the matter. Not so with the N.L.R.B.; its refusal to adjudicate leaves the injured party without a remedy either through N.L.R.B. or the courts.

There have been instances in which it has been charged that N.L.R.B. refused, under political or other pressures, to hear the claims of injured employees, and there is some evidence to give color to the charge. Without attempting to assay the truth of the charge, it is enough that the possibility of such conduct exists.

The net result of this situation is that the Wagner Act has, by what was probably mere legal stupidity, introduced into American law the third and wholly vicious type of administrative law, because as a practical matter the N.L.R.B., an executive agency, is supreme over the law itself to the point where it can destroy all the rights of the injured employee.

In any revision of the Wagner Act this vicious fault should be corrected and the law placed upon the logical, scientific footing required by the concept of due process.

Correction is a simple matter; either require the N.L.R.B. to hear and determine all claims of injured employees or give the injured employee a remedy in the ordinary courts. The point is probably a small one, judged numerically, but it is a large one qualitatively because it involves the equality of men before the law. The Railway Labor Act, it may be noted, contains no such absurdity.

We now come to a consideration of the general scheme of the Wagner Act. The Act made the assumption that there was in existence what it called a "practice and procedure" of collective bargaining. Unquestionably there was in existence a practice and procedure of collective bargaining, but it was founded, as we have already noted, upon radically different premises from the premise that the union represented the employees of an individual employer. The premises of the prior order were economic force, monopoly, craft solidarity, and union-principal contracts.

Apparently the framers of the Act never saw the problem which the introduction of the idea of representation created. As nearly as the author is able to determine, they simply conceived that they were giving to employees a right to become members of their respective crafts, in which event the craft would bargain in the usual way, not for the employees as such, but for the craft as a craft. It never occurred to them that they, in shifting the basis of power out of the craft and into small units of employees, were subordinating the craft to the individual, thereby making it impossible for the craft to bargain as a craft and paving the way for dual unionism, independent unionism, and introvert industrial unionism.

Note has already been made of the confusion which resulted from this failure of the Wagner Act to define in uncontradictory fashion the sort of collective bargaining which it contemplated. It is again adverted to here for the purpose of pointing out that any modification of the Wagner Act should begin with a clear understanding of the sort of social institution which is to result. Is it to be craft unionism, introvert industrial unionism, or extrovert indus-

trial unionism, or a combination of the three? Is labor peace to be secured by contract and, if so, is the contract to be of the union-principal type or of the union representative type? Who is to be "responsible" under the contract, to what degree, and for what? These are the questions which must be answered before a rational modification of the Wagner Act can be undertaken.

Most of the plans offered for modification of the Wagner Act are aimed at the correction of details, chiefly procedural details. It is an error to correct the details unless the general shape of the collective bargaining process be laid out with clarity, the end result defined, and the relation of the parties to each other delineated. Details can then be aligned in conformity with the substance.

We shall observe in our detailed examination of the Wagner Act a definite hiatus between the substantive right which it grants and the procedure relied upon to enforce it. A pertinent example exists in the celebrated *Allis-Chalmers* case wherein the employees were held to be represented by a C.I.O. union which they had definitely repudiated in favor of the United Mine Workers on the ground that the C.I.O. would be unfairly treated if it were not allowed to represent the employees—this under an act which deals wholly with the rights of employees and says not a word about the rights of unions! This gap results from the failure to form first an adequate concept of the social institution and then to fit the detail to that concept.

In fairness to the framers of the law it should be remarked that they have done no worse than earlier lawgivers. It is an historic pattern of law that it begins with procedure and evolves substance; early English law was little more than a set of rules for the governance of the physical combat by which issues were actually settled; the resolution of issues by reason rather than by combat was a later development. In like manner the Wagner Act, beginning with ideas largely procedural, may be expected to evolve a sound substance, if not by construction, then by amendment.

CHAPTER IX

THE WAGNER ACT—THE AFFIRMATIVE ASPECT

We turn now to consider the operative provisions of the Wagner Act. They fall naturally into two divisions:

1. The affirmative aspect, embracing provisions for the selection of representatives and for compelling the employer to bargain.

2. The negative aspect, embracing provisions for preventing employer interference tending to frustrate employees' freedom of choice and concerted activity.

Those provisions of the Act which constitute the affirmative aspect consist of a specification of what may constitute an appropriate bargaining unit and a grant of power to the National Labor Relations Board to delineate the unit; further, a grant of power to the Board to determine by secret ballot "or otherwise" a "question or controversy" concerning representation. The scheme is topped off by an oddly phrased command upon the employer to bargain with the chosen representative.

The actual procedure employed by the Board in the practical administration of the Act was originally, considered in the light of legal science, childish and cumbersome in the extreme. Though ignoring some substantial rights of parties on the ground of administrative expedition, it permitted mountains of objections of the red-tape variety to be raised by parties whose real rights were not at all affected. This condition was not wholly the fault of the Board; it resulted in good part from the previously obscured fact that a new and ill-understood social institution had been unwittingly created—the representative union. It may be remarked that there has been a steady tendency on

the part of the Board to improve its procedure as experience highlights its defects; but the major defects still remain.

An understanding of these defects is of vital importance. It is commonly accepted by all sections of our population today that there is nothing wrong with the principle of the Wagner Act—the principle that employees may freely choose their representatives. It has been proved to be a practical and orderly principle. It is a principle designed to further industrial peace by resolving organizational controversies. Yet the Wagner Act, in its actual administration, resulted in an enormous upswing in labor strife, and it is significant that the upswing in organizational strife exceeded the upswing in all other forms of industrial strife. Various explanations of this phenomenon have been given which cannot be examined here, but the author is quite convinced that a great part of the organizational strike total is traceable to the procedure by which it was sought to enforce the representative principle.

To understand the procedural errors of the Act we must examine the historical background of the term “question or controversy.” Before the representative principle achieved legal existence in the affirmative sense, the term “question or controversy” had an absolutely different meaning from that which the representative principle connoted. In those days a representation controversy was a simple affair—a union as principal on one side, an employer as principal on the other. In some few instances two unions, each claiming in its own right and not as representatives of the employees of the particular employer, contended with each other and perhaps with the employer. There was no legal duty of recognition; economic force or personal considerations prompted employer choice. The whole controversy arose, ran its course, and was settled without reference to employee rights.

This was the historic “question or controversy”—employer versus union, with both as principals. The introduction of the representative principle required a new

social concept of a "question or controversy," because the idea of representation was itself a novel idea to the law. For the old framework of reference of economic force, a new frame-work of reference had been substituted, the right of choice.

In the old order of things there were some features which, on superficial examination, bore some of the apparent earmarks of freedom of choice. For instance, there were "voluntary" applications for membership in unions. There were also "representation strikes"—a form of organizational tactic used to impress upon an employer the power of the union to interrupt his business. But these customs and tactics were not the outcroppings of any idea of representation; they did not signify that employees were exercising a right; they might even be the result of trampling upon what we now know as the right of choice, *i.e.*, the applications might have been secured by duress and the strike brought about by the same means.

Observe now the effect of giving to the majority of employees the right to select a union. In the first place the employer is reduced to the status of a bystander, a neutral (the N.L.R.B. belatedly came to the conclusion that he was but a "nominal" party in representation cases); he ceases to have a choice in the selection of his employees' union and his former right to object to the union desired by his employees is taken from him. The claimant union, if it has no moral uncoerced majority support, is trespassing on the right of the majority to select its representative; whether or not it has majority support, it can no longer enter the fray as a principal; it is reduced to the status of a representative.

Under the new order then, whose rights are affected if the claimant union is wrong in its assertion that it represents the employees? The answer is obvious—the employees and only the employees. What then is the shape of any "question or controversy" which can arise concerning representation (barring, for the moment the question

of the extent of the bargaining unit)? The answer is equally obvious—the “question or controversy” can exist only between the claimant union and a possible adverse majority of the employees. This is an extremely simple and logical conclusion. It is also a highly practical conclusion and had it been adopted by the Board in the beginning as the basis of its procedure, the tremendous strike toll of the late thirties would not, and could not, have occurred. Yet the Board (and nearly everyone else) was so obsessed by the old idea of “question or controversy” that it adopted the old idea as the basis of its procedure.

The result was that the Wagner Act, designed as the instrument of labor peace, actually became a weapon of war; instead of settling “questions and controversies,” it made controversies out of questions and raised questions where none had before existed. It threw the employer into the position of adversary on a matter with respect to which he had been made legally indifferent. It forced the actual majority union into a cumbersome and time-consuming mess of red tape, which caused employees to strike in disgust. It provided a field day for the minority or non-representative union which was enabled, by tactics which, however unconscionable, were legal, to bring an adverse majority under its control, achieve contracts, and procure the discharge of employees. To cap the folly, the employees, who had all the rights and whose rights were the only rights which might be taken away in such a proceeding, were given no voice in the proceeding except in the uncertain event that an election were held and an employer and a nonrepresentative union were permitted, often with the benediction of the Board, to barter away, each for its own advantage, the rights of the majority.

Understanding that this resulted from a confusion of the historic idea of “question or controversy” with the newer meaning which the Wagner Act breathed into that phrase, we now examine the procedure.

Let us consider the sort of question which presents itself

when employees become involved in the business of selecting a representative. While the circumstances of each organizing campaign vary, the general pattern is much the same as the pattern of a political campaign; the formulation of an issue (if one has not been kindly donated by some maladroit act of the employer), the procuring of pledges of support, usually in the form of membership applications, the counteractivity of opposition groups and procuring of pledges of support on their behalf. The electorate, or rather sections of it, swings from one side to the other during the campaign as differing motivations appear, some selfish, some not. Just as in political campaigns a varying number of diffident employees will be found, together with some who simply cannot make up their minds.

A phenomenon usually present to a far greater degree in labor than in political campaigns is the tendency of individuals in the electorate to give outward manifestation to a choice which is not the true inward choice of each. The labor issue is infinitely more close to home and more personal to each individual than political issues, and stresses and strains result which make the ultimate outcome much more unpredictable. It is quite usual, for instance, to find that in an organizing campaign, a substantial number of employees have signed membership cards in one or more unions and in addition have signed a statement opposing unionization. Some of these multiple signers will have acted out of a desire to be protected whichever way the cat jumps; others will sign to please bench mates, although they really oppose a particular union. So also it is not uncommon to find employees who represent themselves to the employer as antiunion, but who in fact are prounion, and occasionally the converse will happen, *viz.*, an employee antiunion-minded in fact will represent himself to the employer as prounion.

Whatever the causes may be, the existence of this phenomenon is amply proved by the frequent variance between the number of pledges obtained by the union and the returns

of elections by secret ballot. Sometimes the variance is small; sometimes it is wide. Often it is sufficient to show that a paper majority is, in fact, a minority. This much is certain—that the only really reliable index of majority selection is the secret ballot, for only the four walls of a voting booth can shut out the influences which impair the expression of morally free choice. Political experience has demonstrated that overt selection of candidates furnishes no competent evidence of true choice, and overt selection of unions is far less trustworthy.

Under these circumstances it is virtually impossible in a case in which there is a substantial divergence of employee opinion either for the claimant union to know that it has a morally free majority or for the employer to know where the majority lies, or even for a majority to know that it is a majority. Still less is it possible for an agency such as N.L.R.B. to know, even at the time the claim based upon overt evidence is made, where a majority lies; and to attempt, some months after a claim is made, to determine upon overt evidence whether the claimant had a majority is in the same category as omitting a political election and then attempting some months thereafter to prove what the result would have been if you had held the election.

There is also, of course, a group of cases in which there is little or no cleavage among the employees. This group of cases can be identified only by the participants in each case, and even then their judgments are based largely on intangibles which cannot be objectively proved. The employer is normally the least informed of the participants.

Now the task of the law is twofold:

1. Quickly to seat the majority union and firmly to establish its authority.
2. To exclude minority and nonrepresentative unions.

There is no dispute about the first point. There is, however, a school of thought which regards the second point lightly, at least until, in a particular case, its own ox is gored. To explain the attitude of this school we must

revert to our remarks about craft unionism and extrovert industrial unionism. We have already observed that craft unionism is necessarily intolerant of employee choice. For somewhat similiar reasons, extrovert industrial unionism is intolerant of employee choice, but the limits of its intolerance tend to be, instead of labor-market areas, competitive-product marketing areas. Dualism and nonunion shops, while they react somewhat differently on each type of unionism, are anathema to both; dualism and nonunion shops are rooted in employee choice, wherefore employee choice cannot be tolerated. The employee and his rights must be subordinated to the interests of the craft in the one case and the industry in the other.

Having in mind the historic blunder of the N.R.A., it is not surprising to find the N.L.R.B. in its early days not greatly concerned about the right of employees to choose between unions and to reject any and all unions, and to find itself being admonished by the courts that "the right to organize and bargain collectively involves the right not to organize and bargain collectively." The judicial conclusion was, at that time, a philosophic a priori conclusion drawn from the nature of the right to organize. The conclusion was correct, and in the practical workings of labor relations had so impressed itself upon N.L.R.B. that in 1944 a Board member, presumably reflecting the attitude of the Board, found it necessary to admonish the War Labor Board to cease trespassing upon the right of employees to remain unorganized.

It must be so from the viewpoint of the employee. Unionism, particularly unionism of the monopoly variety, cannot be, from the viewpoint of the employee, at all times and in all places a blessing. Monopoly unions aim at standardization, for example, and if standardization means for a particular group of employees that they will be leveled downward instead of upward, then they are clearly right in deciding, if it is left to them to decide, to reject a particular monopoly union.

A concrete example will serve to illustrate the value to employees of this right of rejection. A C.I.O. local had for some years been seeking to organize a plant in the baking industry, but made little headway. It was unable to make headway for a very simple reason—its leadership clearly demonstrated that it was incompetent leadership so far as the baking industry was concerned. The incompetence was evident, for instance, in its campaign literature based upon the elimination of speed-up at the delivery end of the ovens, because anyone even slightly acquainted with baking knows that oven delivery must be kept at a fixed rate to avoid half-baked or burned products. If the employees had accepted such leadership, they would have involved themselves in continual turmoil with the company and with each other and achieved no results comparable to the sacrifice they would have made, and the leadership (it must be realized that unions suffer much the same evils that other political organisms suffer) would be hard to unseat.

During the same period, an A.F. of L. local attempted organization of the plant and spent several thousand dollars in the campaign. It also failed for two simple reasons: first, because its leadership exercised dictatorial powers in a neighboring plant and was personally dishonest and, secondly, because, after a strike at the neighboring plant, it left a substantial number of its loyal strikers to walk the street while new employees filled their jobs.

In course of time the plant was easily and quickly organized by another local of the same C.I.O. International of which the unsuccessful local first mentioned was an affiliate. The leadership of the local which succeeded demonstrated that it was competent and conversant with the problems of the employees.

If these employees had been obliged to accept the first comer, their right to organize would have been rendered valueless. The right to remain unorganized is, both logically and practically, a part of the right to free organization.

This the schools of craft unionism and of extrovert indus-

trial unionism could not admit, because of the characteristic of monopoly inherent in those forms of unionism. Since these were the philosophies of unionism current in the middle of the last decade, they had their effect on the mechanism for the selection of employee representatives.

The actual machinery adopted for accomplishing the twofold purpose of the law involved the following steps:

1. The claimant union presented to the employer a demand for recognition and the employer was obliged "in good faith" to determine where the majority lay. If the employer decided to recognize the union, no question or controversy arose, and a contract was signed which settled the wages, hours, and working conditions of the employees, and also, presumptively, the representative status of the claimant union. If the employer determined this question wrongly, the employees were without legal remedy unless they organized a competing union and succeeded in proving, thereafter, on the basis of overt evidence that the employer was guilty of an "unfair labor practice" in determining the issue wrongly, whereupon the contract would be set aside. The union and the employer need give no notice of this type of recognition to the employees, and contracts could be and often were signed without the knowledge of employees.

2. If the employer refused to recognize the claimant a "question or controversy" arose and N.L.R.B. assumed jurisdiction if the claimant filed a petition. It was open to the claimant, however, to attempt to procure recognition by economic force and a minority or nonrepresentative union was very apt to resort to economic force; sometimes, also, a truly representative union, faced by a situation in which red tape could be used against it either by the employer or by a minority group, would strike in exasperation. If a petition is filed, the Board calls the employer (but not the employees) into formal conference and tries to obtain recognition for the union if, on the overt evidence, its claim appears to be valid. Sometimes the employer who may be using the withholding of recognition as a trading

point agrees to recognize the union, perhaps in consideration of reduced contract demands. If the employer still refuses, then the Board tries to obtain the consent of the employer to the holding of an election, under terms settled between the claimant, the employer, and the Board.

3. If the employer does not consent to an election, a formal hearing is held at which the claimant and the employer present evidence as to involvement in interstate commerce, the scope of the bargaining unit, the possession by the claimant of employee support sufficient to justify an election, and the details of the prospective election. If an election is held, notice is given to the employees, but this is usually the first formal notice of the proceedings that they obtain. The result of the election may be contested by the claimant or the employer but not by the employees as such.

4. If an employer declines to recognize the claimant and the claimant can prove, by overt evidence, that it had a majority when the demand was made, it is possible to maintain against the employer an unfair labor practice proceeding, of which the employees are given no notice, which will result in an order binding the employer to deal with the claimant.

The most striking feature of this mechanism is the tender care shown the claimant and the employer, who have no rights under the Act, while the role of the employees, who have all the rights, is minimal and incidental. The least requirement of legal science and of common sense is that, if the rights of parties are to be taken away or determined, those parties must be given notice of the action or proceeding by which or in which their rights are to be determined or taken away and be given an opportunity to take legal measures for the protection of their rights.

The starting point of a rational mechanism for the selection of representatives should, therefore, be some form of notice to the employees designed to permit them to take such action as would protect their rights, *e.g.*, permitting

craft groups to resist their inclusion in industrial units, permitting those opposed to the claimant to demonstrate that they are a majority. The N.L.R.B. of late has instituted a practice of posting a notice of representation proceedings in plants with this object and is to be commended upon this sensible step; but the practice is loose, is not founded upon any rule, and the absence of notice, apparently, does not affect the validity of the proceedings; and notice is not required to be given in those cases wherein the employer does not controvert the claim and grants recognition.

If the protagonists of the Wagner Act had carried out in practice the logical consequences of the principle of choice and had fashioned a procedure based upon the idea that no longer was the employer a real party to representation controversies (on the issue of employee choice), but the only possible opponents of the claimant union were the employees, a more just, more peaceful, and much more speedy mechanism would have resulted.

While this book designedly stops short of recommending specific remedies, the reader is asked to think through the possibilities of a procedure along the following lines:

1. Contracts (in the tenure field) not to be valid unless made with a certified union.

2. Demand for recognition not to be made to the employer but to N.L.R.B.

3. Employees to be given an opportunity to oppose the demand before N.L.R.B., *i.e.* to come in and claim exclusion from the bargaining unit, to call for a secret ballot, and to be heard in the setting of the conditions governing the election. If no opposition develops, claimant to be certified.

4. Employer to be limited to contesting the unit if he can show that the choice of unit works a hardship on him. Commerce issue to be relegated to enforcement proceedings.

5. Employer neither required nor permitted to recognize a claimant until certificate issues.

The foregoing is not the most perfect procedure possible;

there are noticeable and correctible flaws in it. But observe these virtues in it.

1. No dispute can arise between claimant and employer as to whether or not claimant has a majority.

2. The nonrepresentative or minority claimant, if it bypassed N.L.R.B. and used strikes or coercion to achieve a contract, would have no contract, wherefore its incentive to strife would be removed.

3. The employee would be protected from coercion from any source, since the ballot box would stand between a pugnacious union and the contract which its ought to achieve, rendering coercion unproductive.

Any such scheme would, of course, if applied in the casual field, quickly wreck craft unionism. Extrovert industrial unionism would, depending upon circumstances, suffer directly and indirectly, because it cannot tolerate the principle of choice and anything that furthers the freedom of the employee to choose tends to undermine extrovert industrial unionism. Thus, in the industry which is the prime example of extroversion, coal mining, the Progressive Mine Workers is now dual to the United Mine Workers as a result of the principle of choice. This particular instance of dualism has not yet resulted in any general conflict because the war permits no competitive market in coal, but if either of the unions adopts a wage scale low enough as compared with the other to make wages a factor in price competition, then the higher wage union will be forced into a counter-organizational drive, regardless of the right of the low-wage group to select its own representatives.

The celebrated Battle of Montgomery Ward's of 1944 had its logical origin in the adoption by the N.L.R.B. of the historical view of "question or controversy." Since the case is an excellent example of how civil disorder results from legal confusion, a short examination of the incident will be worth while. Having adopted the historical view of "question or controversy," which furnished a false premise, N.L.R.B. was logically forced into an unreasonable

doctrine respecting the duration of the validity of its certificates. It could not entertain, under this doctrine, a proceeding by employees designed to revoke their designation of a bargaining agent, because no "question or controversy" existed. Consequently, it had to issue its certificates on a vague "good-until-the-employer-refuses-to-recognize" basis and threw the burden upon the employer to refuse recognition if, in course of time, he doubted (actually, wishfully, or strategically) that the union retained a majority. But the Board could not entertain a petition by the employer designed to unseat the union; that would open the door to endless controversy with anti-union employers. Instead, it required the employer to refuse, at his peril, to recognize the union and run the risk of an unfair labor practice proceeding.

Upon the expiration of the Ward contract, Sewell Avery, no lover of the union, gladly took up the burden placed upon him by N.L.R.B. and denied that U.R.W.D.S.E.A., the union which held the certificate, retained a majority. He was able to show, chiefly because of a large turnover in the working force, that there was a real doubt as to whether or not the union still held the allegiance of the majority. If, under these circumstances, he entered into a maintenance-of-membership arrangement with the union, his act would be a positive violation of the Wagner Act, which forbids such relationships with minority unions. He therefore declined to extend the existing contract, at least as far as the maintenance of membership feature was concerned.

The War Labor Board, to which the union appealed, conceded that there was some doubt that the union represented the employees, but nevertheless ordered Ward's to extend the contract pending the resolution by N.L.R.B. of the question of representation. Ward's pointed out that if it renewed the contract it would be violating the Wagner Act and that the Smith-Connally Act deprived W.L.B. of power to order a violation of the Wagner Act, wherefore it could not lawfully obey W.L.B. W.L.B. was logically

cornered; if the union still held a majority N.L.R.B.'s certificate was still valid and the maintenance-of-membership agreement would be lawful, but if the union majority had been dissipated—and W.L.B. had conceded that there was reasonable ground for so believing—then the N.L.R.B. certificate would be invalid and W.L.B.'s order would be itself unlawful. Nevertheless, W.L.B. ordered extension of the contract, but ordered the union to commence a proceeding before N.L.R.B. to obtain a new certificate, thus requiring Ward's to honor the certificate while holding that the validity of the certificate was doubtful. Avery refused to comply, the union struck, the Army seized the business and carried Avery out of his office in his chair.

The dramatics of the case, the press photos, the recriminations, the Congressional investigations, unfortunately divert the public mind from the root of the trouble. Observe how the difficulties clear up if, in place of the historical idea of "question or controversy" the idea required by the major postulate of the Wagner Act—employee choice—is followed. Under this idea the "question or controversy" exists not between the employer and the union but between the union and the employees. The dissident employees logically become competent to file a petition to unseat the union. N.L.R.B. can then logically insist that its certificates are valid for all purposes until the employees, by formal proceeding, revoke their designation of a particular union as bargaining agent. So long as the certificate remains unrevoked, Avery is not in a position to express doubt about it. W.L.B. can rely on the certificate and order extension of the contract. Avery's objection that W.L.B. is forcing him to commit an unfair labor practice falls, because the certificate is conclusive upon the employees and an absolute defense to Ward's against unfair labor practice proceedings. Avery, having no valid objection, would comply; the strikers would not strike and the Army would be left to fight its war in peace.

The case shows vividly how muddled labor law can breed

labor strife. Just such muddled concepts have made the Wagner Act, which was designed to ensure labor peace and maintain the "free flow of commerce," the instrument for increasing labor strife and damming up commerce. The principle of choice, if applied in accordance with the accepted procedures of legal science, could have served its purpose, as the Railway Labor Act has demonstrated; its failure can be attributed only to legal misapplication. Expedience, rather than tested legal principles, was allowed to govern its application. However practical expediency may be at a particular time, its continued use results in chaos, and there is no more forceful demonstration of this than the strike record of the late thirties.

We conclude that the right of choice of the employee is very badly protected by the procedural mechanism of the Wagner Act. The chief reasons for the defective procedure (the reasons are interrelated) are the historical concept of the term "question or controversy" and the hangover of the historic tenets of craft unionism and extrovert industrial unionism upon the new social organism—the introvert industrial union—created by the principle of choice.

It may not be amiss to notice here the fact that charges of prejudice were frequently hurled at the original administrators of the Wagner Act. Judged by the strict wording of the Act the charges are justified; but we are compelled to observe, to be just, that those administrators had a task imposed upon them as impossible as that of squaring the circle—the task of justifying craft unionism and extrovert industrial unionism, which were then the only known varieties, upon the principle of choice, which is compatible with neither. Neither in practice nor in metaphysics could that task be accomplished. Later administrators have not been subjected to such great criticism because slowly the hard facts have forced them closer and closer to acceptance of the logical result of the Act, the introvert industrial union; the gap between reason and practice is gradually closing.

The fundamental conflict produced distortions in almost every aspect of the procedure. Claimant unions, rightful and wrongful, and employers, thrown into opposition, developed fine techniques in gerrymandering the units and raising pettifogging issues; it was often easier for a rightful claimant to strike than to litigate. Wrongful claimants could often badger employers into recognition. By bringing in outside unions and signing contracts and other means, the employer could force rightful claimants into long unfair labor practice proceedings.

Despite the exaggerated role accorded the employer in representation proceedings (quite out of keeping with the "nominal party" status now accorded him by the Board), his real rights were not well protected. A fundamental right of employers is that they shall be provided a certain standard of conduct to which they will be required to conform; but practice under the Act actually required them, at their peril, to guess what the result of an election would have been if it had been held and to judge in particular cases, in advance of Board determination, whether the Board would follow the craft union philosophy or the industrial union philosophy in fixing the unit. To impose such a gamble upon anyone is patently unjust.

Again, it exposed the employer to economic attack by a claimant union but forbade him to deal with the union if the union did not represent the employees. To remedy this unjust condition some states adopted laws permitting employers to initiate representation proceedings. This is unwise (as the National Board recognizes) and inadequate because it does not stop the economic attack. A procedure which denied validity to a contract unless the certificate of the Board were obtained would be a much wiser and more adequate procedure.

It may be mentioned that the difficulties of the N.L.R.B. with the conflict between extrovert unionism and the principle of choice are only a part of the total difficulties. The continual embroilment of the Roosevelt Administra-

tion in labor difficulties resulted in great part from its endeavor to foster the extrovert type of unionism upon an introvert base. If extrovert unionism is to progress and expand, then the principle of choice must be destroyed by outright repeal of the Wagner Act and its derivatives. On the other hand, if introvert unionism is to operate smoothly, the traces of extroversion must be extinguished.

To make concrete the point that extrovert unionism cannot long exist upon an introvert base, consider an extrovert policy recently advocated by the United Automobile Workers of America—the setting of wage rates in the automobile industry so that they will be uniform nationally. The object of the policy is to prevent manufacturers from operating their outlying plants, which generally have lower wage scales, in preference to their Detroit plants. One can readily see that, if the workmen in the Squeedunk plant became convinced that this policy of that union will take work away from the Squeedunk plant and concentrate it in the Detroit plants, they will abandon U.A.W. and choose some other agency as their representative or, alternatively, force U.A.W. to accede to their local autonomy. In either event the extrovert policy will be defeated because the employees of the Squeedunk plant have the right to choose their representatives.

In one case which received notoriety, certain groups employed by the Consolidated Edison Company of New York and organized by A.F. of L.'s Electrical Workers, abandoned their affiliation with that union and organized the intramural Brotherhood of Consolidated Edison Employees, stating as their reason that the A.F. of L. policy (an extrovert policy) would have distributed the new construction work of their employer over the whole of the construction craft which the A.F. of L. had organized. They wanted the introvert policy of confining, so far as possible, the new construction work of the company to the permanent employees of the company. Although the matter was complicated by the presence of the C.I.O., the

independent movement prevailed after an N.L.R.B. election. While the case involved many obscuring ramifications, it illustrated vividly that the power now lies in fragments of a craft or industry to prevail over the extrovert union which purports to control that craft or industry.

In justice to the Roosevelt Administration it must be remarked that its critics both Republican and Democratic have likewise failed to recognize that the source of the trouble lies in the conflict between extroversion and introversion.

The Roosevelt Administration, although failing to recognize the deep-seated cause, made an effort to curb the results of the conflict by bringing pressure to bear upon the A.F. of L. and the C.I.O. to merge. The theory of the effort was that if the employee were limited in the agencies which he might select, then the effects of giving the employee the right to choose would be curbed. The merger failed, but, even if it had been consummated, the problem would not be solved, for the right of choice and the introvert union which it created are now too much a part of the social fabric to be aborted by a mere merger; in place of the erstwhile dual union another dual union would spring up because the right of the employee to choose had been left intact.

The Administration has been temporizing with the problem. The real political question has not yet developed. The question was present in the issue of the authority of the War Labor Board to order a closed shop, but a temporizing device—maintenance of membership—averted the necessity for meeting the issue head on. It cannot be averted forever. If the C.I.O. is successful in prevailing on the Administration to adopt its platform of corporate economy the issue may have to be met, for corporatism requires monopoly unions, and, in any particular industry where it is applied, either the A.F. of L. union or the C.I.O. union, unless they are merged, will have to be destroyed. Should events take this course and

no temporizing device is available, what then will be the answer? That is the political question.

Two points touching the affirmative aspect remain for consideration, *viz.*, the procedure whereby bargaining rights are enforced and the idea of the bargaining unit. The latter is the subject of a separate chapter and we now proceed to discuss the former.

Reference to the Congressional course of the Wagner Act leaves one with the distinct impression that the command upon employers to bargain collectively was an afterthought. In the Act it appears at the tail end of the proscriptions which form the negative aspect of the Act, although functionally it is a part of the affirmative aspect. The command reads:

It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9(a).

Section 9(a) provides that the majority choice in an "appropriate" unit shall be the exclusive representative.

The succeeding section, 9(b), provides that "in each case" the Board shall determine the propriety of the unit.

The wording of the Act leaves some doubt as to whether the employer is called upon to bargain before the Board has issued its certificate determining the unit and identifying the representative. The Board and the courts have ruled that the employer is obliged to determine these "at his peril" even before the issuance of a certificate.

This obscurity, coupled with the negative expression of what is really an affirmative duty, the duty to bargain, result in a "fuzzy" and lengthy procedure which frequently makes a strike a much more satisfactory remedy. The unsatisfactory practice of determining by overt evidence the choice of employees has already been observed. When this type of evidence is resorted to so long after the original time of choosing that employee sentiment may have entirely changed and when no steps are taken to measure

employee sentiment at the latter time, the procedure is obviously unsound and the results dubious in the extreme.

But even in those cases where there has been a prior certification by the Board after election so that the question of representation is capable of fairly certain proof, the procedure falls short of adequacy.

It is beyond the scope of this book to examine the legal technicalities involved in this proposition, but the practical side of it may be summed up in the proposition that the law, rather than answering the important practical question, "What unlawful conduct of the employer is, here and now, standing in the way of agreement?" answers the somewhat academic question, "What unlawful conduct of the employer several months ago stood in the way of agreement?"

Instead of a summary, a flexible proceeding to compel parties to bargain in good faith or to prune their conduct of unlawful acts, the present law provides for a stiff and formal proof of past illegality terminating in an order directing the employer to do what the law obliges him to do anyhow. If the proceeding were designed to jail, fine, or otherwise punish a recalcitrant employer, then the proof of past illegal conduct would be a necessary element. But where the proceeding is designed to compel the employer to act in the immediate future, then all that is essential is to rule out that which he now wrongly sets up as an obstacle to the bargaining process. To maintain such a proceeding all that should be necessary is to show that the union is actually the representative of the parties and that, in the belief of the complaining union, the employer is currently interposing an unlawful obstacle to the bargaining process. A court of equity faced with such a problem could do much to prevent obstruction by applying its flexible forms of relief, *e.g.*, parties could be made to reduce proposals to writing, proposals could be construed, masters appointed to supervise negotiations, unlawful proposals could be barred. It may be that an administrative

tribunal is constitutionally too weak to administer proper relief, and the transfer of the proceeding to the courts would be an improvement on present practice.

The Wagner Act has often been criticized as one-sided. In most cases the criticism is based on a misconception of the purpose of the Act. Insofar as it relates to this proceeding, however, the criticism is well founded. Employers are obliged to deal with the unions in good faith but have no ready means of relief against the union which deals in bad faith, makes unlawful demands, and sometimes goes so far as to attempt to wreck a business. A proceeding of this sort should be available to the employer to prune the union's conduct of unlawfulness and malice.

CHAPTER X

THE WAGNER ACT—
BARGAINING UNITS

The original befuddlement concerning the subject of the propriety of a bargaining unit is very apparent in the language of the Wagner Act. The section which controls the subject reads

The Board shall decide *in each case* whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of the Act, the unit appropriate for collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof.

The policies of the act which are referred to are

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

The language used to describe the policies of the Act is so vaporish as to cause one seeking a standard for unit delineation to wonder if there is any idea at all in it. The use of the term "self-organization"—a novel concept at the time—gives rise to the notion that the lines of the unit are to be laid out as the employees wish. The limiting term "unit" itself imports some sort of internal coherence and an exclusion of noncohering elements. The phrase

“terms and conditions of their employment” seems to imply that the test of cohesion is to be some homogeneity of working conditions.

But these inferences are obscure; the language remains that of persons lacking a sense of direction, for there is no accurate guide to the selection of the type of unit; there are only limits on the types—employer, craft, or plant. The attacks made upon this section by the A.F. of L., which was chiefly responsible for its enactment, show that the direction which the Board gave to the language was not the direction intended by the A.F. of L.

There was good cause for the befuddlement, for the framers of the Act found themselves unable or unwilling to make a choice between the divergent philosophies of craft unionism and industrial unionism. That was the then known problem, but it was not the only problem. Though not seen, the problem of choosing between the extrovert and the introvert forms of industrial unionism was present.

As we have seen, the proper organizing bases of the three types of union are

Craft: The limit of the craft in the labor market area.

Extrovert industrial: The limit of the competitive marketing area of the industry.

Introvert industrial: The employer or some segment of his establishment, whether on craft or other lines.

Only the last type can be satisfied by a single-employer unit or any subdivision of a single-employer unit, because the first and second types must tend to monopoly within their respective limits. The strict wording of the Act would seem to preclude multiple-employer units.

The Board therefore was faced with the problem of establishing multiple-employer units to permit the historical forms of unionism to live and it attempted to meet the problem by adopting two criteria designed to justify such units, *viz.*,

1. The historical criteria, under which a past course of dealing between organized employers on the one hand and the employers of all of them as a unit, on the other hand, would be regarded as establishing the propriety of a multiple employer unit.

2. The unitary working-force theory, applied to the West Coast stevedores, under which a group of employers drawing casual labor spasmodically from a common pool of employees would be regarded as establishing the propriety of a multiple employer unit.

The first theory is inadequate to satisfy the requirements of craft or extrovert industrial unions, for no monopoly can be maintained on a purely historical basis. A monopoly must reach out and embrace the new competitor or fall apart; it is a dynamic and not a static institution. Moreover, in practice it has not served to bolster extroversion, a fact which the present dualism in coal mining attests. To date this dualism has not had serious results, but if coal from Progressive Mine Workers' mines starts to displace coal from United Mine Workers' mines in competitive markets and the displacement results from a disparity of wage rates, the results are bound to be serious. Depending on how it is applied, the historical theory may either perpetuate or destroy this dualism.

The unitary working force theory, if not applied beyond the limits of the labor-market area, more nearly meets the requirements of the older forms of unionism. However, it is almost impossible to apply, unless there is some artificial condition, such as a decasualization pool or a license limitation to mark out the limits of the unit. Thus a unit might be constructed from the records of the hiring halls of the steamship companies on the West Coast, but it could not be constructed where the custom of "shaping" as practiced in the Port of New York obtains. Likewise, a trade under local license, such as plumbers or stationary engineers in New York City, might constitute a unit, but an unlicensed trade, such as carpentry, could not.

The exceptional character of these cases serves to empha-

size the general failure of the Wagner Act bargaining unit provisions to conform to the requirements of historical unionism. The vast majority of the unit decisions of the Board have been introvert in character, which may be indicative of the fact that the ingenuity of the extrovert unions is incapable of furnishing a satisfactory rationale for the multiple-employer unit. The principle of choice requires limits; the older principle of force knew no limits.

More significant than the lack of a satisfactory rationale for the multiple-employer unit is the fact that there is no social pressure upon the Board to develop extrovert units. The vast majority of representation petitions ask for a purely introvert unit, indicating that the basic tenor of employee sentiment, except in certain special industries, is toward introversion and away from the extrovert form. The close, personalized, and local concerns of everyday working conditions interest employees; the generalized, impersonal economogeographical concerns of extrovert unions leave them cold—as cold as they were toward extrovert unionism before the Wagner Act became law.

We have noted in another connection the fact that a "craft unit" does not betoken craft unionism and also that craft units have a peculiar utility at the present day. That peculiar utility is to prevent the submergence of the interests of the craft members which tends to follow upon cellar-to-roof industrial organization. We now must note that the problem of submergence is broader than craft lines and may apply to almost any type of subdivision. For example, where there were two divisions of a railroad which had had historically separate seniority systems and one of the divisions was abandoned, the attempt to dovetail the two seniority lists (thereby causing loss of seniority to a substantial number of the employees on the division left in operation) resulted in rupture between the employees of the latter division and the remainder of the unit. Considerations such as the foregoing may well engender in employees a desire for the autonomy of a separate unit.

The observations made in the last paragraph are made simply to point out that there are, despite the fact that a craft bargaining unit is not a factor in the craft union scheme of things, legitimate reasons why craft and other subdivision units should continue to exist.

One more feature of unit determination deserves consideration. In the early days of the Act, as a result of its abstruse language, there grew up, chiefly among employer counsel, the idea that the bargaining unit was to be determined by the circumstances of the business alone, unrelated to the particular organizing effort of the moment. This idea may best be understood by mentioning some of its corollaries, *viz.*, if a plant unit had once been determined to be appropriate, barring a change in the business, a craft unit within that plant could not later be held appropriate, or if a number of craft units were found appropriate in one business, *e.g.*, printing, every other printing plant of like structure should be divided in precisely the same way, and a cellar-to-roof unit barred.

One employer's counsel, arguing before a labor board, stated that he had examined every unit determination of that board in a certain industry and had concluded (expressing his surprise) that the only element common to all cases was that the unit found to be appropriate was the unit claimed to be appropriate by the union. He requested the board to state whether his conclusion was correct, which the board did not do. But the board, with certain limitations, might well have answered that his conclusion was correct and was, in substance, the law. The test of whether or not employees may "self-organize" lies, in this aspect at least, in whether they may select the form which their organizing will take. Employee choice of unit is fundamental; the shape of the business structure is secondary. Any one of several different alignments will be found appropriate if—and only if—the employees decide to organize according to that particular pattern. If, of course, the employees have organized according to a pattern

which does not possess unity, either because it is a mere fragment of a larger unit or because it is a mere congeries, a lumping of groups having little in common, then the claim of the union need not be respected. A choice of unit is, needless to say, fatal to extrovert unionism.

In any revision of the Wagner Act the language referring to unit selection should be made more clear.

CHAPTER XI

THE WAGNER ACT—THE NEGATIVE ASPECT

Those provisions of the Wagner Act designed to prohibit clogs upon the right of choice constitute what we have called the negative aspect. They are found in Section 7, subdivisions 1, 2, 3, 4. In essence they provide that, except by a closed-shop contract made with a current majority representative, an employer may not interfere with, restrain, or coerce his employees in the exercise of their right of choice.

Apart from the problem of the closed shop, which has been discussed *passim* and is also the subject of a separate chapter, and the "coercion from any source" problem which was discussed in Chap. IX, there are two organic problems involved in the negative aspect, *viz.*,

1. The intramural or "company" and the "company-dominated" union.
2. The union-principal idea as restricting communication between management and employees.

Prior to the legal recognition of the right of choice there does not appear to have been any very close distinction drawn between a "company" union and a "company-dominated" union; in the eyes of unionists of those times both were vicious. This was so because the unionism of the day was strictly extrovert; and a "company" union, even though it was not dominated by the employer, was still vicious because it was introvert, more especially so if it, by excluding the extrovert union, interfered with the monopoly of the latter. Introversion was the major offense; company domination was secondary. The advent of the right of choice, however, sanctified the undominated

company union in law and in practice, though the dominated union remained obnoxious and thereupon the distinction became important.

The one-plant union, prior to the modern era, appears to have stemmed from two sources. In many cases company unions had their origin in a bold attempt by employers to exclude extrovert unions and were unions largely of a nominal character designed for legalistic and litigative purposes only. In other cases they appear to have had their origin in the recognition by the employer of the fact that often the successful operation of a plant, particularly a large plant, absolutely requires some institution resembling the modern introvert industrial union to relieve the strains caused by unilateral fixation of wages, hours, and working conditions. A good many "company" unions were the result of a combination of both factors, the importance of each varying from case to case.

When the right of choice became a legal right, it became possible to choose an intramural union. But if the employer either dominated the choice itself or dominated the organization which resulted from a free choice, then there was a fraud upon the right of choice. The employer could negotiate with his alter ego rather than with a freely chosen and free representative. Thus the test of company unionism became inadequate and that of company domination had to be substituted.

Domination took two main forms. Organic domination, common in the "representation plans" in existence before 1935, existed where the employer, by the written or customary constitution of a union or representation plan, exercised a control over it. Employer tallying of ballots would give such control; so also would a final reference of decisions of the union to some company official, usually a plant or general manager. Many other devices could be used to assure control. Organic domination was susceptible of ready and reliable proof and began to disappear rapidly after the enactment of the Wagner Act, in many

cases by voluntary employer action on legal advice, which fact betokened its readily identifiable character.

Inorganic domination involves every means of control not depending upon the constitution of the union, embracing a whole gamut of devices from moral support through coercion to bribery. In cases of inorganic domination, the proof is not so clear cut and cogent as in the organic cases. This is so because the inference of domination in these cases must involve a consideration of imponderables—of human attitudes, personalities, and personal relationships: of what novelists would call “local color”—many of which are incapable of satisfactory proof.

In this connection the Supreme Court has aptly used the term “congeries”—a heap of unrelated facts. Depending on which elements of a congeries one selects, several different varieties of institution may be constructed. The very point of the decision which used the term was that inability scientifically to demonstrate the validity of the selection would not stand in the way of its acceptance by the courts.

The nebulous character of the determination led to the adoption by N.L.R.B. of a number of rules of thumb sometimes associated with company domination. These were external indicia from which an inference of domination was drawn. Two of the common ones may be mentioned, *viz.*, the holding of union meetings on company property and the presence of supervisors at union meetings.

The use of such tests does not furnish an adequate logical base for the conclusion of domination and complicates the procedure in another direction. To illustrate this point, using the two tests mentioned, the common meeting place of the chapels of the International Typographical Union is the composing room floor. Foremen, who by union rule have the right to hire and fire, are commonly present at chapel meetings. Now, no informed person would conclude that I.T.U. is company-dominated, even though from time to time a forceful or persuasive foreman is able to sway chapel decisions, yet it has two of the damning indicia of

company domination. This is sufficient to reveal the arbitrary character of the indicia.

The procedural complication mentioned above came about because unimpeachable organizations such as I.T.U. had some of the arbitrary indicia of company domination. How was the N.L.R.B. to escape condemning I.T.U. as being company-dominated, since it exhibited these arbitrary indicia of domination? That difficulty was answered by the adoption of another arbitrary rule—the rule that charges of company domination would not be entertained against A.F. of L., C.I.O., and other “recognized” unions.

Being arbitrary, this last rule also posed its difficulties. What of the A.F. of L. or C.I.O. union which was unquestionably company-dominated—to illustrate by an actual situation, a local union whose business agent, over a course of years, had come to expect a gift of \$2,500 from a particular employer upon signing the contract? In these cases N.L.R.B., though it would not entertain a charge of domination, would proceed against the employer on the theory that he had interfered with, restrained, or coerced his employees.

Now in considering this matter of company domination the validity of the process must be tested by two standards:

1. Justice to the employer.
2. Justice to the employees.

Since the right of the employer to interfere with the choice of his employees is now nonexistent, he cannot complain of being prohibited from a course of conduct that has a general potency to interfere with the right of choice. This is true whether or not the course of conduct actually does interfere.

No problem therefore is posed by orders of N.L.R.B. prohibiting employer conduct in domination cases, organic or inorganic, even though arbitrary indicia be used and even though scientific premises cannot be erected under N.L.R.B. conclusions.

But this reasoning cannot be applied to N.L.R.B. orders

affecting employee conduct. The employee has the right of choice, which involves the right to create his own organism for representation. If he is deprived of that right, he loses the basic right conferred by the Wagner Act.

Once having established on the basis of such evidence as is available that a union is company-dominated, N.L.R.B. will order that the union be disestablished as a bargaining agent and disqualified as a candidate for election. To arrive at this latter stage it must make the further inference that the conduct of the employer with reference to that union has so paralyzed the wills of the employees that, even in the sanctuary of a voting booth, they cannot freely choose. When this startling inference is coupled with an arbitrary immunization of A.F. of L. and C.I.O. unions, it will be seen that a substantial leverage is gained by the "recognized" unions.

A practical appraisal of the problem of company domination would seem to dictate a solution along the following lines:

1. In all cases, a prohibition upon employers directed against all acts tending to accomplish domination, whether they achieve their purpose or not.
2. In organic cases, disestablishment.
3. In inorganic cases, disestablishment only upon consent of the electorate after secret ballot.

The justification for the last requirement lies in the congeries idea. A congeries being what it is, the understanding of the background is the only safe guide for the selection of the elements to form a correct conclusion. It is, however, practically impossible to reproduce that background by testimony; only those who have lived in it understand it fully. The appraisal of a Board reading a printed record is valueless; but the appraisal of employees who know the environment and the characters involved can be accurate. Such a process can operate with the surety that the electorate is not being deprived of its right of choice.

Observing the devious and tortuous working out of the company union, some have said that N.L.R.B. favored the A.F. of L. and the C.I.O. Merely to arrive at such a conclusion does little to solve the problem; the underlying facts must be appreciated and the problem which posed itself to the inner mind of N.L.R.B. must be appreciated.

The problem was this: the Wagner Act is designed to propagate unionism; unionism as we know it is craft unionism and extrovert industrial unionism—both monopoly forms; yet the words of the Wagner Act, by creating a right of choice, tend to destroy monopoly and hence to destroy unionism as we know it; and the company union, an introvert form, is the most concrete evidence of the tendency of the right of choice to destroy unionism.

How can we harmonize the conflicting requirements of monopoly and freedom? The answer, of course, is that monopoly and freedom cannot be harmonized. To arrive at a conclusion, which seemed to destroy unionism, was not easy. The vision of a whole new social institution, introvert unionism, founded on freedom was denied to them. Since they could not comprehend the real radicalism of the principle of choice, they remained conservative and defended the existing order. Out of their inability to accept in full measure the radicalism of the Wagner Act grew an amorphous state of the law in which the old and the new, irreconcilable, both strove for existence amid legal and logical turmoil and labor strife.

The second organic problem involved in the negative aspect is created by the notion that has grown out of the union-principal theory of contracts. The idea is that where a bargaining agent has been selected, the employees must be insulated from management in so far as direct communication of ideas is concerned; the theory being that all ideas of management must be channeled through the agent.

The workaday application of the idea occurs chiefly in connection with the progress of bargaining negotiations. The idea is so applied as to prevent communication by

management to employees as to the state of offers, counter offers, and interpretation of offers except through the union. While the right of free speech is here involved, that is not the aspect which concerns us; what concerns us is the functional relationship of the idea to the institution of unionism.

All extrovert forms of unionism must, in the nature of things, hark back to the union-principal theory of contractual relationship. This is so because they do not and, if they are to serve their extrovert purposes, cannot represent the employees of any one employer; they speak perforce for the craft or for the industry as a whole.

Since this is so, the Wagner Act, which tends to force them down to the level of a representative, creates a set of problems, for if they stand in the relationship of principal to the employees and to management, their rights and duties must follow one standard, whereas, if they are merely representatives and subordinate to the employees, the standard will be quite different. For a principal has rights of his own; an agent merely asserts the rights of another.

If, therefore, a union deals as principal, its conduct in negotiation is distinctly a matter which concerns itself. Its fidelity or infidelity to the interests of a particular group of employees, whether it informs the employees as to its dealing or not, whether it truly communicates to them the offers of the employer or not, become immaterial. Hence, if the employer seeks to communicate directly to the employees information bearing upon such subjects or information in justification of his position the union may rightly complain that he is usurping its function, by-passing it, and seeking to undermine it.

If, however, the union is a mere representative, then its electorate is the principal, and the fidelity of its agent as well as the accuracy of its information as to the state of negotiations become essential to its operation. Hence, the publication by the employer to the electorate of such information is no usurpation; there is no by-passing so long as the contract is not concluded directly with the elec-

torate; and, instead of undermining, the process becomes one that enables the electorate adequately to instruct the union in the discharge of the duties that it has assumed.

Since the latter is the theory espoused by the Wagner Act it would seem clear that a prohibition upon communication is unwarranted. This matter is important because strikes not infrequently result from misunderstanding by the employees of an offer or an attitude of the employer on a particular matter, which, if adequately explained to the electorate, would be acceptable to it. Some union officials have deliberately misrepresented offers in order to produce a strike. In the majority of cases, however, the general misunderstanding occurs as a result of misunderstanding of the officials themselves or an unwillingness to recede from a position they have taken even after such position has been demonstrated to be unsound. The latter is what we colloquially call "bullheadedness." If the electorate received information from the employer directly, it would be in a position to examine and control the conduct of its agent.

CHAPTER XII

THE CLOSED SHOP AND RELATED ARRANGEMENTS

We have observed the deep significance of the closed shop to the craft union in the casual field and have observed that its significance, which is also its justification, has continued to this day. It is still "absurd to . . . give assent to 'casual craft unionism' . . . and deny its logical consequence—the closed shop."

With reference to tenure craft unionism we have observed that, prior to the Wagner Act, the closed shop had much the same significance as it did in the casual field, because it was the prop of the monopoly of the labor-market area essential to craft unionism. We have also observed that the principle of choice destroys that monopoly and hence destroys craft unionism, though the outward trappings of craft unionism may be retained.

In the field of extrovert industrial unionism we have observed that the closed shop or, more often, the "union shop" prior to the Wagner Act, was an essential because it was the means of maintaining monopoly over the employers of those who were engaged in the production of competing goods. We have also observed that the principle of choice conflicts with the monopoly necessary to maintain unions upon an extrovert basis.

The impact of the adoption of the principle of choice generally will, of course, be different upon each type of historic unionism. In the case of the casual craft union, while in theory its impact would be disastrous, yet in practice the principle of choice cannot be applied. Casual craft organization, therefore, has been neither promoted

nor retarded by the Wagner Act. The limitations laid upon the closed shop by the Wagner Act are not susceptible of enforcement in the casual field.

In the case of tenure craft unions, these have been wiped out as such, but the going unions in the field found in the Wagner Act a fairly satisfactory substitute. This leaves them, however, as unions whose activities are of extrovert character, but whose organization is of introvert character. No longer do they look to a monopoly of skill as the base of their power, but to the retention of a majority in each individual shop. This opens the door to shop by shop, as distinguished from trade bargaining, and the institution awaits the development of the proper stresses to change its complexion. Some events are occurring which may have no significance but which may be straws indicating the directions of the wind, *e.g.*, the decision of the Printers to organize the unskilled composing room help and also their decision to tolerate a separation of restaurant menu printers. The closed shop acts as a retardant to change, but the efficacy of the closed shop has been considerably impaired by the limitations placed upon it by the Wagner Act; as is demonstrated by the loss to the A.F. of L. Machinists' Union (which, incidentally, has almost wholly lost its craft character) of numbers of closed shop contracts under the drive of its C.I.O. rival.

The extrovert industrial union, since it also depends upon monopoly, is adversely affected by freedom of choice. Since the monopoly in this case is not a monopoly of the labor market but of the employers comprising a competitive market, the results of freedom are not felt until a price disparity results from wage disparity. The wage disparity need not be the result of lower wages but may result, for instance, from a portion of the industry being on an incentive-pay basis, which usually results in lower labor costs per unit produced. The importance of monopoly to the union structure varies greatly for, depending on the proportion of the labor cost to the price of the product,

the impact of free choice will vary as the importance of monopoly to the particular union structure varies. In coal mining, for instance, where labor costs form a large proportion of the selling price and the commodity is fungible, a slight differential between United Mine Workers' rates and Progressive Mine Workers' rates, translated into competitive prices, will produce a conflict between United and Progressive. In industries where labor cost has not much importance, we generally do not find extrovert unions, but if there were such, monopoly would have little importance, and freedom of choice would have little effect on the union structure. It follows that the closed shop has, in extrovert industrial unionism, an importance which varies directly with the need for monopoly and inversely with the impact of free choice on that monopoly. In any case, however, the tendency of free choice is to destroy extrovert industrial unionism; whether in a particular case the destruction is actually accomplished will depend on circumstances.

In making these observations it may be well to note that the practical effect of the Wagner Act is to destroy the essential concept of the closed shop as developed by the historical forms of unionism. It accomplished this in two ways:

1. By making the validity of the closed shop depend upon majority will in the unit.

2. By creating the concept that a closed shop, once established, could be destroyed by a shift in majority opinion.

It is fairly obvious that, although a monopoly union may be itself controlled by vote of its constituents, it can never admit a right in nonconstituents to refuse to conform to its policies; hence the Wagner Act by giving effect to a choice by a majority vote of nonconstituent elements to remain nonconformist, attacks the very heart of historical unionism.

Again, a monopoly union must tend to perpetuity. We

have observed the restrictions upon individual members designed to achieve this result, *e.g.*, refusal to accept resignations unless the resigning member was quitting the trade as an employee. For precisely the same reasons that unions cannot tolerate a choice on the part of individuals, they cannot permit whole groups of employees to become or to remain nonconformist. It was always true, of course, that collective contracts were drawn for limited times, but the assumption was that once a shop was closed it remained closed, and the union could not permit a retraction in subsequent contracts. Prior to the Wagner Act this had to be so; but the Wagner Act introduced the idea that a majority might unseat even a closed-shop incumbent; and the N.L.R.B. has, in many cases, done precisely that. The new idea violates the fundamentals of historical unionism.

We now come to discuss the closed shop in relation to introvert industrial unions. We have noted that the principle of free choice is antagonistic to the principles of monopoly unionism and antagonistic to the closed shop. In adopting the principle of free choice the necessity for monopoly disappears and a new organizing mechanism, the elective mechanism, takes its place.

The first fact to be recalled is that the closed shop is an abridgment of the right of employees to choose their representatives; the design of the closed shop being to freeze a union into representative status against the will of a majority. Not only must the will of the majority be balked, but the right of the minority to seek to become a majority must be taken away along with the right of each individual to advocate a change of representative. This is true not only of the closed shop but also of any continuous compulsory membership arrangement such as a "union shop," an arrangement whereby selection of employees is left to the employer or a maintenance of membership agreement or a "proportional shop," an arrangement whereby the incumbent union may insist on an agreed proportion

of the employees, usually from 60 to 80 per cent, maintaining union membership.

It is not true, however, of certain arrangements which are usually linked with the closed shop but which do not embrace the continuous-compulsory-membership feature. One such arrangement is the "preferential shop" whereby the employer is required to hire or attempt to obtain satisfactory help from the pool of union men, but there is no obligation upon the employees, once hired, to retain their membership. Other such arrangements are the "service charge" or "nominal membership" shops wherein some or all of the employees are required to pay a service charge to the certified union or to pay dues thereto, although they need not join in the case of "service charge" shops, nor in the case of "nominal membership" shops need they be affiliated with the union otherwise than financially.

Now there is a group of common arguments in favor of continuous compulsory membership which we shall presently notice, all of which are demonstrably fallacious once the right of choice is granted as a premise. But even as we dispose of these fallacies we shall come to wonder at the solid current of respectable and informed opinion which favors the closed shop. Out of this wonder will come the question, "Is there some unexpressed predicate behind this current of opinion; some ill-formulated or unrationalized premise which accounts for this current of opinion?"

It appears to this writer that there is such an unexpressed predicate and that that predicate involves an unwillingness to accept the introvert form of unionism. This conclusion is necessarily arrived at, not from readily identifiable premises, but by reading between the lines of declarations made by those holding, with unquestioned honesty, the continuous-compulsory-membership viewpoint. The arguments which they advance are, as we shall see, fallacious, but the argument which they have not advanced, largely because they have not fully rationalized it in their own minds, is the argument which actually sways them.

What type of evidence leads to this conclusion? Take, for example, a recent speech of a man in public life who has done as much as any man to foster the introvert mechanism. His view, expressed in that speech, favors "industry-wide collective bargaining," distinctly an extrovert institution. We have observed that the dualism (or pluralism) fostered by the principle of choice tends to destroy and is, in fact, destroying industry-wide bargaining, yet a great deal of respectable thought regards industry-wide bargaining as the ideal goal of unionism, continually referring to England and Sweden as halfway-to-heaven examples.

These people see in a muddled way what Pius XI saw clearly—that industry-wide bargaining is an impossibility unless the union has "characteristics of monopoly." They cannot, therefore, accept fully those consequences of the principle of choice which make monopoly impossible. As a result, they envision a morally impossible social organism—a monopoly the elements of which are free. It is the attempt to project such an absurdity into collective bargaining which has caused a great deal of the increase in labor strife resulting from the Wagner Act.

There is another segment of respectable opinion which reaches the same conclusion by a slightly different route. These people realize that industry-wide bargaining can be achieved only by institutions of monopolistic character. They shrink, however, from the further step that such monopolies will be forced to shed their private character and become "true and genuine organs and institutions of the state" and that the other logical consequences will follow:—the outlawing of strikes and public adjudication ("compulsory" arbitration) of the conditions of labor. Some also are impressed by the two warnings of Pius XI in connection with the corporative scheme—the tendency to suppress private initiative and the tendency to bureaucracy, and their impressions are fortified by the Italian experience. Therefore, they are driven to the unreason-

able doctrine which attempts to support a monopoly on the basis of employee choice.

The idea of industry-wide bargaining is somewhat of a fetish which has been too little rationalized. There is a great deal of it in England and Sweden, but those countries are so different from our own in their physical and economic geography, in their social and industrial structures, and in the outlook of their people that the success of a similar scheme of things here cannot be predicted. The celebrated American inventiveness, which is the marvel of the world in respect to physical things, had to be matched by an equal amount of inventiveness in business, in finance, in marketing, and in advertising, and the result is a production and distribution system of staggering complexity. A goodly part of our competition in this country is not price competition but competition in respect of quality, often cross-industry competition, *e.g.*, railroads against bus lines, plastics against metals. Even price competition is conditioned, to a great extent, by the vast distances, relative to England and Sweden, that goods must travel to market.

The result of these factors has been that there is a marked tendency in American industry to adjust its labor practices to accord with local community practices rather than with isoindustrial practices in other localities. The tendency is just as strong, if not stronger, on the part of the workingman as it is on the part of the employer. If the workingman works in a Michigan community, he adjusts himself to the social habits and scale of living of people on the same work level in Michigan, and he is much more apt to be disturbed by a small disparity between his own conditions and conditions in a neighboring plant, whether or not it is the same industry, than he is by a great disparity between his own conditions and those in a like plant in California. If he deems his wages too low, it is because they do not enable him to assume his proper place in Michigan society; not because there is a paper difference

between his own wages and California wages. He applies the standard of practical living, not the theoretical economic standard.

This attitude on the part of the workingman accounts for the popularity of the introvert industrial union and, also, for the unpopularity of extrovert industrial unions. Introvert unionism is home town unionism; a handling of things local by local hands. The setting of wages and working conditions on a broader geographic base lacks appeal. This is a readily understandable frame of mind; any individual employee has a much greater importance and a much greater participation in the settlement of these matters when they are settled locally than when they are settled on some broader base and the chance of individual satisfaction is thereby increased. The settlement of these matters by representatives far removed from the individual means a loss to the employee of that feeling of satisfaction which results from a close participation in the bargaining process.

A further factor in the unpopularity of the extrovert industrial form had, no doubt, been the rather scanty achievement of those unions measured against conditions in the rest of industry. Unquestionably unions of that type have achieved marked gains over what conditions were in those industries before their advent, but the conditions are not enviable when the standards of other industries are applied. For the most part such industries are in low-wage categories; working conditions are usually in the barely tolerable class. In coal mining, for instance, considering the hazardous, dirty, and laborious nature of the work, wages are not high despite the strength of the major organization in that industry. The needle trades, laundries, and like industries are not attractive despite a high degree of organization in some markets. Employees in such industries who have come under the writer's observation do not seem to be a satisfied lot, and their sentiments run to a noticeable degree toward regarding the unions

as working too closely with the employers, regarding the unions as the lesser of two evils, or regarding the unions as instruments for the satisfaction of their dialectic yearning rather than for improvement of the lot of their members. Such folk make poor missionaries.

The desirability of cleaving to the ideal of industry-wide bargaining is thus rather speculative both from the viewpoint of the possibility of selling the idea to employees in industries not presently organized in the extrovert form and from the viewpoint of the economic and social practicability of extending the extrovert form. Granted that the industry-wide organization provides a better vehicle for the peaceful settlement of disputes, as it probably does, is it wise policy to achieve statistical peace by submerging the responsiveness of the introvert form to the needs and desires of men living a social life integrated more directly with their immediate employment than with the economic conditions of an industry? Does industrial peace warrant the loss of the moral values gained by closer participation of the individual in setting the pattern of his work life?

So much for industry-wide bargaining as the foundation for closed-shop policy. We now turn to the arguments advanced in support of the closed shop. The first of these proceeds from correct premises but reaches a conclusion broader than its premises. The argument is founded upon the financial needs of unions and lays it down that the union is by majority choice the exclusive representative of the unit and that its contracts confer benefits upon all in the unit, members and nonmembers alike; wherefore it is entitled to financial support by all, be they members or nonmembers. So far this argument is unassailable, provided that the union recognizes its own correlative obligations to nonmembers, such as nondiscriminating treatment, equal use of its grievance machinery, and participation in meetings of the unit called upon questions affecting the unit.

The counter argument, which seeks to exempt members

of the unit from the obligation of financial support on the ground that they are not and do not wish to be members of the representative union, is untenable. Where a unit exists, be it political or social, governed by majority, the obligation of financial support rests upon all members of the unit alike, so long as they remain members of the unit, regardless of whether they approve of the choice of the majority. This is the universal, necessary, and accepted rule of any suffragist society; the opposition cannot escape its obligations merely because it is the opposition. One cannot escape the payment of Federal taxes because he is a Republican and the taxes were laid by a Democratic Administration; and an attempt by a Republican to escape military service on the ground that this current war is a Democratic war would be absurd.

Once we eliminate from our minds the tendency to confuse unit membership and union membership, the obligation of the unit member to contribute to the carrying on of the work done on behalf of the unit becomes crystal clear. Historical unionism knew no distinction between unit membership and union membership because such corporations as bargaining units did not exist prior to the Wagner Act. Unions and the public generally have been slow to recognize that a new type of social entity was brought into being when the idea of "bargaining units" became law; the tendency is still to lay emphasis on union membership and to obscure unit membership.

It may be remarked, parenthetically, that *Quadragesimo Anno* recognizes a parallel distinction in the case of the monopoly labor unions which it describes, divorcing the question of union membership from the question of financial obligation and justifying the latter on the score of employment in the industry served by the labor union.

An obligation founded not upon union membership but upon unit membership will, of course, be restricted in scope. For instance, if the union dues include retirement benefits,

it would be manifestly unfair to collect such dues from an employee who did not desire membership.

In recognition of the essential difference between union membership and unit membership, contracts negotiated in this country according to the Estes formula, notably the contracts of P. Lorillard & Co., refer to the financial obligations of the employees as a "service charge" rather than as "dues." The "service charge" shop thus created is a wholly logical, coherent, and morally sound development of introvert industrial unionism. The remedy of the minority which may resent payment is not to refuse payment, but to win over sufficient additional support so that it will become a majority; this is the remedy of minorities in any suffragist society.

This "service charge" shop is the maximum form of organizational arrangement which can be predicated upon the obligation of financial support. Clearly the conclusion that continuous compulsory membership in the union is warranted on this ground is broader than the premise. The argument founded upon financial support is, therefore, a fallacy.

The second argument which we shall consider is the "union security" argument. Here again the conclusion is unsound. The argument is that unless the closed shop be granted, an employer may by discrimination in hiring and in discharge undermine the union to the point where it will lose its majority and, hence, cease to be a bargaining agent. Where the argument is presented on behalf of the union shop, rather than the closed shop, the hiring element is omitted and the discharge element alone retained. The argument as it is used in support of the union shop comes to two conclusions, both of which are fallacious. These are

1. The employee will be protected in his right to choose his representative by the granting of the union shop which renders ineffective a policy of discriminatory discharge.

2. The right of the majority to select its representative will be preserved by the union shop.

Since the union shop, as we have seen, abolishes the right of choice by giving the employee no alternative but membership, the first conclusion is false.

The second conclusion is also false and for the same basic reason. For if every individual in a given unit loses his right of choice by the removal of alternatives, then majority choice is impossible, for a majority is nothing more than a concurrence of purely individual volitional acts.

It is true, of course, that the Wagner Act limits the closed shop, the union shop, and membership-maintenance contracts by requiring that the union be the majority representative at the time when the contract is made. The right of choosing when the choice is of a representative is illusory unless the representative is responsive to and responsible to the electorate. This idea will be made clear if we consider that in times past in some nations kings and emperors were selected by majority rule but, once selected, no one considered them to be representatives in the modern sense of that term because they were not accountable to the electorate, did not reflect the views of the electorate, and did not have to stand for reelection. An extreme example to clarify the idea exists in the modern case of Herr Hitler. He came into power by parliamentary processes, but few think of him as representative because the electorate lost the power to control him. The absence of continuing responsibility to the electorate, even if there was majority choice in the first instance, destroys the idea of representation.

We have recognized this in our political institutions; the prime example being the lame-duck amendment to our Constitution. "Lame ducks" are officials who are no longer accountable to the electorate. In precisely the same way, upon the granting of a closed or union shop or frozen majority arrangement, the union, though originally a majority choice, becomes a lame-duck representative because then its responsibility to its electorate is destroyed.

This lame-duck character of certain unions, acquired through such union security arrangements, is the foundation of a series of evils shading off from bribery to mild corruption. With the removal of responsibility from the representative, the power to prescribe contract terms and to police the contract passes out of the hands of the electorate and into the hands of the union, which, in practice, most often means the hands of the union officials. The unscrupulous employer is then in a position to make private arrangements with the union officials, bribing the more venal, and winning the good will of the more circumspect by guaranteeing them continuance in union office through the destruction of opposition within the union. In one instance within the author's experience, although there appeared to be no evidence of bribery, a set of complaisant union officials was maintained in office by the company through a maintenance-of-membership arrangement. The device operated so that, if political opposition developed within the union, the employer would discharge the opposition spearhead, which, of course, would be without remedy because the grievance machinery was in the hands of the union. On the other hand, if opposition took the form of advocacy of a change of unions, the officials would find the spearhead guilty of dual unionism and expel them, whereupon the company would comply with the contract terms and discharge them. Over a period of two years there were some sixty-five discharges, each of which bore evidence that it had arisen out of opposition activity, the size of the working force being about 1,800.

The foregoing case serves to illustrate a further element of speciousness in the argument for the union shop. Observe that the employer coercion was directed not at the existence of the union but at the attainment by the rank and file of the very objects for which the union existed. It served the employer's purpose much better to accept the union in form, protect its formal existence by a maintenance-of-membership arrangement, and sabotage specific

moves which would be costly to the employer by discharging the protagonists of such moves. For example, within a few days after one employee had moved, in union meeting, to retain counsel to advise on the legality of reopening the wage issue with a view toward increasing wages, he was discharged. How much better (in a short-sighted way) it was for the employer to control these matters by using the union form as a cloak to cover its discrimination! To have a voice in determining his working conditions the employee had to join the union; having joined he could not advocate a change of unions and his voice in determining working conditions became still, for to speak out in meeting meant discharge.

In another case with which the author had something to do, this time under a closed-shop contract, the contract rate of pay for experienced help was 85 cents per hour, but experienced help (the contract defined them as those with six months or more work at the operation) received in practice a top rate of 65 cents per hour. Beginners, who were by the contract to receive a minimum of 45 cents per hour, were receiving as little as 17 cents per hour. Protest to the employers was useless; protest to the local officials resulted in expulsion from the union; protest to the International officials brought inaction. Instances such as these are hard to imagine under circumstances where the officials are accountable to the electorate. Only a lame-duck system can produce them.

Hardly any of the nationally organized unions have been free from similar incidents where they have had continuous compulsory membership arrangements. The printing trades have a better record than most—notably the International Typographical Union. In the last-named case, the relative freedom from abuse can be traced to an organizational element, an internal judicial system (from which our courts and lawyers could learn some valuable lessons) which, in effect, separates the executive from the judicial power within the union by making each chapel

a court capable of controlling official acts. Since chapels are generally units small enough to be suitable for judicial purposes and their meetings are well attended because they are held upon the composing-room floor, an efficient check is placed upon the executive branch of the union government. Most unions, however, suffer from the constitutional fault of commingling executive and judicial powers in the officials, which results in the cry of "Dictator" often heard concerning union officials.

It may be suggested that the electorate has its voice in the management of the union and can control the officials. In the first place, the electorate of any one bargaining unit is not often the same electorate which, in theory at least, governs the officials; normally it is but a part of a larger electorate. The electorate of the union at large is not necessarily interested in the welfare of any one shop; there is no interest, as there is in a craft union or in an extrovert industrial union, in securing uniformity. Therefore, it is hard for the members of any one shop to interest the members of other shops in their particular plight and union officials may play one unit off against another. In the second place, and more importantly, the continuous-compulsory-membership device not only aborts the control of the shop electorate over the union; it also aborts the control of the union members over the union officials.

For by the same coercive process through which employers once throttled unionism, union officials are enabled to throttle the formation of a political opposition within the union. The possibility of expulsion from the union, which carries with it loss of job security—the mere possibility without specific threat—is often sufficient to prevent the dissatisfied, who may be a majority, from taking effective political action within the union. Rank and file movements generally succeed only when some leader courageous enough to risk his job appears. It is not uncommon to find in unions seething with dissatisfaction

that officials are reelected under *ja und nein* ballots, for the simple reason that they are able to block the formation of a political opposition through job control. The union member, in those cases, is in precisely the same situation with reference to the union officials as he was with reference to employers before being organized—he must submit or starve.

In the case of unions operating on craft principles or on an extrovert industrial basis, where maintenance of a monopoly is the prime objective, there is at least an arguable reason for destroying both the employee's right to choose his bargaining representative and his political freedom within the union. In the case of the union operating on introvert principles, making nonuniform contracts with individual employers, no reason exists for destroying either of these rights. That union which bases its claim upon majority rule must in reason accept the verdict of a later majority adverse to it.

So much for mere rebuttal of the argument based on union security as it is advanced in support of the union shop. There is, however, evidence supporting the conclusion that the absence of continuous compulsory membership not only does not tend to destroy unionism, but tends to increase it. In discussing the Railway Labor Act we noted such phenomena as an increase in the extent of unionization, an improvement in the moral tone of the unions, and the substitution of a businesslike approach for an emotional approach to common problems of labor and management. These are not accidents; they are results of forces operating in that field which are not operating in general industry.

The famous outlaw strike of 1922 left the railway unions in an extremely weak and puerile condition. Their weakness was much greater than a mere statistical count of membership would indicate, for large numbers of employees retained their membership to protect their insurance and like benefits who could not be counted upon as supporters

in any contest with management. The weakness of the unions is reflected in the small number of strikes which occurred between 1922 and 1926. In 1926 the Railway Labor Act was passed, giving the unions a rational mode of organizing, but prohibiting compulsory membership arrangements. Since that time the unions have grown in power and prestige—and in peace—to the point where there is but a small and ever diminishing fraction of important national trackage unorganized.

The mere fact that these unions have grown from the weaklings they were to the powers they are under open-shop conditions is rather upsetting to the theory that unionism will be destroyed without union-security clauses. But to stop with that observation is to neglect the most significant fact, *viz.*, that these unions became powerful not in spite of but because of open-shop conditions.

The explanation is simple. The abolition of continuous compulsory membership placed the control of the unions in the hands of the employees and prevented it from reverting into the hands of union officials. The employees now had the whip of rejecting an unsatisfactory union. Normal political opposition within the union could not be aborted because there was no job control in the hands of the officials. The result was that the unions became truly representative; the union officials were secure so long as, but only so long as they performed their functions honestly and efficiently; wherefore they performed their functions honestly and efficiently. Employees in unorganized units, no longer fearing racketeering or maladministration and no longer fearing being organized only to be "sold down the river," flocked to the unions. Under those conditions unions served their needs, did their bidding, sought sane solutions for their problems. Thus unionism spread in the railroad field, and thus it continues to spread, because unions cannot rest upon force; they have to be good to succeed. To succeed, they become good; being good they succeed in larger measure.

One further observation may be made. Unions in the railroad field are much more secure against the attacks of opposing unions than are their counterparts in general industry. A.F. of L. unions continually fear C.I.O. unions in general industry, and the fear is mutual. The greater the degree of contractual "union security" a union possesses, the deeper its fear.

The explanation of this is also simple. The greatest apparent weakness of a representative form of government is, in fact, its greatest strength. For if the electorate can control the organism which it now has, if it can supplant officials whose policies it does not relish with officials whose policies are acceptable or force incumbent officials to accept its policies, it becomes pointless to substitute another organism. If the incumbent railroad brotherhoods can be made to suit the wants of railroad employees, what reason would there be for substituting the A.F. of L., the C.I.O., or any other group? There have, of course, been cases where a substitution has been made, but organizations in the railroad field tend to "stay put" to a greater degree than those in general industry.

Actual experience, therefore, tends to demonstrate that absence of continuous compulsory membership tends to propagate rather than destroy unionism, produces more honest and more capable officials, and makes unions more secure than those which have "union security."

The "union security" argument as it is advanced in support of the closed shop has somewhat more substance. The closed shop consists of the union shop plus the preferential shop, *i.e.*, the employer is obliged to hire union men in the first instance and all are obliged to maintain membership.

The continuous-compulsory-membership feature is, of course, no less vicious from the standpoint of freedom of choice than it is in the union shop, and it furnishes no more real security. The preferential shop, considered alone, however, does not suffer from these vices. For it is obvious

that the mere selection of new members of the electorate of employees from among a group predisposed to favor the incumbent union does not destroy the freedom of the employees to choose another union, nor does it destroy the responsibility of the union to the electorate. It furnishes, too, a real, not an illusory, measure of security to an incumbent union, for if the employer must hire a union man to replace a discharged employee, discharge for participation in union activity becomes pointless.

It may be noted here that the claim of the unions to the effect that the Wagner Act does not give them adequate protection against discriminatory discharges has some foundation in fact. In the first place, proceedings under the Act are too slow to be effective; they lack the expedition of equity proceedings. In the second place, it is often easy for an employer to accomplish a discriminatory discharge under circumstances which render legal proof of its discriminatory character very difficult. To appraise fully the last point it should be borne in mind that unions and individuals have also succeeded in some instances in making a merited discharge look discriminatory and also that a discharge by an employer designed to check union activity fails of its object unless the discriminatory features are notorious enough to constitute a warning to other employees to cease union activity. The preferential shop, however, renders nugatory any discriminatory discharge by substituting another union man for the one displaced.

But here again a conclusion is drawn that is broader than its premises, for the fact that hiring from among union men is a protection to the union justifies the preferential shop only and leaves the full closed shop unjustified.

The preferential shop is attacked as creating a monopoly of jobs and the preferential feature of the closed shop is open to the same objection. There cannot be any doubt that this tendency is inherent in the preferential shop. In the case of craft unions it is the actual design of the union hiring plan to foster the monopoly of the labor market

essential to both forms of craft unionism. It is fairly hard for industrial unions of either type to administer a preferential shop, by reason of the variety of skills the union may be called upon to catalogue, and many industrial unions, notably the United Mine Workers, find it undesirable for this reason. Other extrovert industrial unions use the preferential shop not because it is essential to the institution of extrovert industrial unionism, which is a product market monopoly rather than a labor market monopoly, but simply to secure employment for members. In the case of the monopoly unions, requiring employers to hire only through the union obviously prevents a candidate for employment in a particular craft or industry from obtaining any employment.

The monopoly-of-jobs argument loses much of its force, however, when applied to a field organized on a volitional basis rather than a monopoly basis. This is so because the choice of employees will tend to put some shops in one union, other shops in another, and leave some unorganized; wherefore a candidate for employment, though he may find some shops closed to him, at least until he joins a union, will not be barred from the industry.

Here it is proper to discuss the celebrated "right to work," which is the subject of much confusing argument. Everyone seems to admit that human beings have the right to work; indeed it would be difficult to deny that it is a natural right in the present state of society. Liberal thought has to espouse a right-to-work doctrine to support its stand on such things as racial equality of employment opportunity. But admitting the right to work, it is said that the right is not absolute, but qualified; that while a man has a right to a job, he has no right to any particular job, wherefore union and employer may contract to exclude nonunion men from jobs. There is, of course, some hiatus between the premises and the conclusion which is bridged by a reference to the "common good," which term is used multifariously to designate the "common good of the nation,"

the "common good of a particular bargaining unit," the "common good of a particular union" without any specification of how the "common good" (whatever be the extent of the term) is promoted by excluding the general public from employment.

But every right possessed by man, in the moral order at least, is qualified; for every right has its correlative duty, and the right and the duty are inseparable. In the moral order, for example, my right to life is not so absolute that I may under all circumstances take the life of another to preserve it. In the legal order, also, all rights are, at least in theory, qualified, although, in practice, legal science is often unable to fashion a measure of the correlative duty, and in such cases the right is commonly said to be absolute. An "absolute" right in this sense, however, remains absolute only so long as legal science is unable to define the obligation. The law often invades rights which are said to be absolute, *e.g.*, the rights to life and liberty may be curtailed by military obligations; freedom of speech by wartime censorship.

The fact that the right to work is not absolute, therefore, does little to break down the argument against the preferential shop. In a modern industrial society the right to work as a means of livelihood is a natural right derivative of the right to life. Such a right cannot be invaded without a clear showing of a superior right in others; nor can practices be tolerated which, *in cumulo*, would substantially cut down the opportunities for its exercise. The principle to be resorted to is the well-recognized rule of law and morals, *use your own rights so that you injure not another*.

Now, in some cases unions can certainly show a superior right; in other cases they cannot show it with any great degree of certainty. A prime case of superior right exists, for instance, in those unions in longshore and stevedoring work which operate, or are parties to, decasualization pools. In such cases, those engaged in the trade can earn a decent

livelihood only if there is no floating labor supply threatening the continuity of employment of those currently engaged at the trade. The opening up to the general public of employment in that field would reduce to near beggary most of those presently at the trade, and those of the public who entered the field would not, in gross, make a decent living at it. Therefore, the exercise of the right to work in that field would damage so many others in their right to work that it will justify an invasion of the right to work. Hence in such situations the preferential shop is justified. So, too, is the "closed union," *i.e.*, the union that in addition to closing shops also closes its own membership books. As we have remarked, the full closed shop in these cases is necessary to the very existence of the union.

In the building trades and in casual trades generally almost as impressive a case can be built up against the monopoly argument and in favor of the preferential shop or of the hiring aspect of the closed shop. In respect of all forms of tenure-labor organization it is harder to justify preferential hiring. Before the destruction of the craft-union principle by the Wagner Act., the tenure craft union could find a justification similar to the casual craft union, but when the tenure craft union is forced off the monopoly base and onto the elective base there is no general justification for preferential hiring. In specific cases there may be a justification in the antiunion tactics of an employer, but that would depend upon questions of fact in each case and furnish no general justification.

As noted above, however, the interference with the right to work is less serious where the elective principle is operating. When, therefore, the full closed shop is allowed to interfere with the elective principle so that an approach to monopoly is possible, the right to work becomes subject to serious impairment.

It may be concluded, therefore, that preferential hiring is not intrinsically wrong; that it is a permissible inter-

ference with the right to work in the case of unions which cannot operate on elective lines, especially where they face decasualization problems; that there is no general justification for its interference with the right to work in so far as tenure employment is concerned; that its interference with the right to work is less substantial where the elective principle is fully operative; that in specific cases in the tenure field it may be justified.

Bound up with the preferential hiring arrangement is a question of justice to the employer. It would be manifestly unfair, for instance, to require a newspaper to select its reportorial or feature staff from among the members of a particular union or to require any employer to select certain types of salesmen or supervisors in that manner. So, too, when historical craft unions operating out of their jurisdiction or industrial unions generally demand preferential hiring, the demand is unjust unless their members possess the requisite skills to give the employer an adequate selection. For example, a local of metal polishers and buffers has demanded a full closed shop of a high-precision metal-goods manufacturer, though it was unable to supply competent machinists.

The remaining arguments in favor of continuous compulsory membership are equally fallacious. One is based upon the assertion that the granting of the closed shop makes for better relationships between the company and the union. This assertion is true in some cases, perhaps in a majority of cases. But where it is true, it is an argument against, rather than in favor of, the closed shop. For the better relationship can only result from an inversion of the status of employees and union, *i.e.*, the union is controlling the employees instead of representing them. The two cases recited above in connection with the accountability of unions to their electorate are perfect examples of "good relations" between employers and unions enjoying continuous compulsory membership arrangements, but they are hardly the lines along which sound relationship

between management and men can exist. It must be realized that when the tenure of the union is made to depend upon a grant from the employer rather than the continual moral support of the employees, then the union will draw closer to the employer than to the employees, upon whom it has ceased to depend. This is consonant with the older forms of unionism, but it violates the basic principle of introvert industrial unionism, *viz.*, the control by the employees of their industrial destiny.

Another argument advanced runs to the effect that if a union is to be held responsible for breach of collective contract it must be given disciplinary power over employees, which disciplinary power it can acquire only through a continuous compulsory membership arrangement. No introvert industrial union is morally responsible for the acts of its electorate. By reducing a union from the status of a principal dealing with rights which are its own and asserting a power which is its own to the status of a representative claiming not in its own right but in the right of employees and subject to its electorate, the Wagner Act has, by any sound standard of morality, also relieved it of responsibility. Not only does it have no moral responsibility, it does not have the coercive power necessary to discharge responsibility, for the power has been shifted out of the union and into the electorate. Recent experience with outlaw strikes amply demonstrates that introvert industrial unions are powerless against their electorates. It is wrong, therefore, to blame any introvert industrial union for breaches of contract by employees unless it actively participates in or foment the breach. The Wagner Act has made the employees morally responsible, and to them alone may the employer look for performance.

It is no answer to this problem of responsibility to say that if the union be given the closed or union shop then it may be held responsible. This answer would be adequate if the Wagner Act were amended to destroy the right of the employees to choose another union at some later

time. But so long as there is a possibility of a counter-organizational drive unseating the incumbent despite its closed shop, this answer is not valid.

But there is a further element of speciousness in this argument based upon responsibility as advanced by introvert industrial unions. Such unions do not, save in exceptional cases, possess the power to exclude employees from the trade or industry as do craft unions and extrovert industrial unions. Their disciplinary power, in the case of breach, is therefore limited precisely to doing what the employer could readily do for himself in case of breach—discharge the employee. The argument, therefore, resembles a lifting by one's own bootstraps—responsibility is assumed in order to discharge and discharge power is assumed in order to assume responsibility.

There are sundry other arguments which hardly deserve extended consideration. One is based upon the resentment which union men sometimes harbor for nonunion men, to which the ready answer is that union men who seek protection of their own right of choice cannot with any sound show of morality deny like protection to the choice of others, though it be adverse.

While there is no rational base for continuous compulsory membership in an introvert industrial union, there is, none the less, a powerful incentive which influences union leaders to seek it. The motive of the dishonest leader is, of course, plain. Even the honest leader, if he can short-circuit that onerous chore of representative government—the necessity of convincing the electorate, finds his task simpler and his personal political future safer. Some of the older leaders trained in the monopoly school of unionism adhere to their original standards. These forces, together with the idea of industry-wide bargaining, tend to keep alive the agitation for continuous compulsory membership.

Meanwhile the N.L.R.B., facing the facts of present-day unionism, continues to nibble away the closed shop.

As this is written, it is deciding that a union demanding a closed shop must accept into membership employees in the bargaining unit—an idea abhorrent to traditional unionism. The future is bound to produce fact situations which must be decided upon the basis of free choice with the inevitable consequence that the closed shop will be whittled away.

CHAPTER XIII

INTROVERT INDUSTRIAL UNIONS

Just as the monopoly organizing principle produced unions with characteristics demonstrably related to that organizing principle, so the elective principle which operated to produce the introvert industrial union left its peculiar marks on the introvert industrial union. We have observed these marks to such a degree that we need not undertake any general examination of them. Some remark must be made, however, of certain developments of introvert industrial unionism so that the full flavor of the institution may be appreciated.

One of the developments lies in the burgeoning social science of job evaluation, that science which seeks, by comparison of the duties and working conditions of particular jobs in particular plants with other jobs in the same plant or in other plants, to furnish a guide for the setting of wage rates for particular jobs. Job evaluation is now an accepted technique with many introvert industrial unions. To any other form of unionism, job evaluation would be unthinkable. It is distinctly contrary to the area pay-scale found in the typical craft union and to the job-for-job parity system of the extrovert industrial union. The older forms of unionism were little concerned with intraplant inequity of the wage scale; their whole effort was to produce interplant parity, craftwise in the one case and isoindustrial in the other. It is typical, however, of the new unionism that it concentrates on conditions within the four walls of one plant and does not greatly concern itself with interplant parity.

Indeed, so little is it concerned with interplant parity that a common argument made to the War Labor Board in the

early days of wage stabilization ran somewhat as follows: "We, the employees of 'Company A,' have always enjoyed a pay scale about 10 per cent above the isoindustrial 'Company B.' You have lately granted an increase to the employees of 'Company B' so that you must now grant us an increase to restore our historic differential." This type of argument was so common that it ultimately resulted in the "Hold-the-Line" Presidential Executive Order of Apr. 8, 1943, and the subsequent institution of the "going rate" as the general limit on the correction of interplant inequities.

These attempts to maintain disparity, markedly contrasting with the efforts of the older forms of unionism to achieve and maintain parity, are traceable to the introvert structure of the union. Power in these unions resides in single shops, not in the craft, nor in the industry. Therefore, their thinking is introvert and their institutions are introvert.

Merit rating—a scheme of paying an individual according to his peculiar worth as an employee—is also a subject of concern to introvert industrial unions. Although obscured for the moment by the "automatic progression" movement—a movement inspired more by the artificial wage controls now in force than by any genuine belief of the unions in the institution as such—these unions have been keenly interested in the method whereby merit increases are awarded and have, by contract, assumed a part in assessing merit. Internal pressures force them to do so. Such activity was also unknown to the older forms of unionism.

Profit sharing and the scaling of wages to the prosperity of individual companies are standard techniques of introvert industrial unionism, but the use of such techniques has been roundly denounced by John L. Lewis, who speaks from the extrovert industrial union viewpoint.

A most curious manifestation of the radical difference between the introvert form and the traditional forms of

unionism appears in the report of a labor press war correspondent who visited the Western Front and talked to servicemen. He reports, "Most of the unionists I have met can't remember the number of the local they used to belong to . . . almost as many can't remember the name of the union either." It is the tendency of introversion to subordinate the union's general activity to its activity in the plant at which a worker is employed. Consequently the identity of the union as such is lost and it becomes in the mind of the worker merely one of the incidents of his job. The worker, therefore, thinks of the union not in terms of its name but as the union which is the bargaining agent in the ABC Company. It is inconceivable that a construction man or a stevedore or a compositor or a coal miner should be ignorant of the name of his union; but the worker in commerce and general manufacture has no reason to conceive of a union on any other plane than the one-shop plane fostered by the Wagner Act.

Not only do such unions deal with their subject matter with a different outlook, but their relationship to the employees and to the employer is fundamentally different. Reference has heretofore been made to the union-representative contract as distinguished from the union-principal contract of traditional unionism. There is no clear public recognition of this vast difference, but little by little an accretion of solid custom and decision is being built up which ultimately will force recognition of the new contract type.

This will occur because the new contract type is inherent in the elective principle. The Wagner Act shifted power out of the union as such and into the employees as a bargaining unit. The power having shifted, responsibility must shift with it, and contracts must have as principals those in whom power and responsibility reside. So we see many indications of the existence of this new contract type. Some of them are

1. A tendency to write contracts running to "XYZ

union or its successor." Ostensibly this covers a subsequent change of affiliation, or a merger of unions, but actually it is a recognition that the working force (bargaining unit) is permanent while the union is transient.

2. Rules of the War Labor Board, such as the "Harvill Doctrine," which accords to a displacing union the same degree of union security which its predecessor had by contract.

3. A reluctance of arbitrators and officials to punish unions as such for strikes in violation of contracts in units which they represent, where there is no clear proof of participation by the union as such.

The last item is the most interesting and significant. If the union is merely the representative of a working force, it is entirely unreasonable to hold it responsible for the acts of the working force. If members of a casual craft union, which has to make its contracts as principal, strike in violation of a contract, it is quite reasonable to damn the union; because being a monopoly it has the power to exclude from the trade and the responsibility of furnishing substitutes for the unlawful strikers. But not so the introvert industrial union which, by law, is subject to employee control.

This points to the ultimate development of the doctrine that the sanction for union representative contracts must be visited not upon the union but upon the defaulting employees. They hold the power; they are the principals. Therefore, theirs is the responsibility for the breach. Moreover, the responsibility exists in their individual capacities as well as in their corporate capacity; not that they, as individuals, ought to be compelled to labor under conditions which are obnoxious to them, but that they individually bear the responsibility of refraining from that concert of action which constitutes a breach and, that they, as individuals, so long as they continue to work under a contract, ought to observe its terms.

The law and bargaining practice has been notably but understandably muddled on the questions arising out of

contractual relationships in the labor field. The law has to date used at least three ill-fitting theories to explain how an employee is entitled to receive an individual benefit under a union contract. In bargaining practice it is still common to find parties wrangling about the insertion of a "no strike, no lockout" clause in contracts—a condition so essential to the success of collective bargaining that it should be assumed. The Labor Boards have added to the general pattern of confusion in the contract field by holding that discharges for breach of contract constitute unfair labor practices.

A clear recognition of the union-representative type of contract should carry with it some collateral ideas that will be powerful instruments in the elimination of labor strife. For instance, if the employees are recognized as principals, then the mere substitution of one union for another as representative in the middle of a contract term is possible. This will eliminate campaigns by one union based upon the theme of getting rid of the bad contract of another union. It will thus render more secure against unreasonable attack the position of the incumbent union. It will also keep the power in the hands of the employees to oust a union which is maladministering its contract.

Introvert industrial unionism has also had its effect upon the structure of unions themselves. Craft unionism, basing its structure on a monopoly of a particular skill, necessarily generated the idea of craft jurisdiction. Extrovert industrial unionism, basing its structure on a monopoly of competing industry, generated the idea of industry jurisdiction. Introvert industrial unionism lacks any comparable idea; employee choice makes jurisdiction a futility. This is reflected in the actual organization of the unions. For example, District 50 of the United Mine Workers embraces crafts and industries in such a completely heterogeneous fashion that no lines can be drawn. A similar union is the United Retail Wholesale and Department Store Employees of the C.I.O. The Transport Workers, C.I.O., and the

Utility Workers, C.I.O., organize electric power employees and, indeed, there is no compelling organic reason why they should not. The single factor, apparently, which tends to preserve some degree of homogeneity in the C.I.O., outside of its few extrovert unions, is that the knowledge of a particular line of business which its organizers acquire enables them to do a more effective job within that industry than in an industry to which they are strangers.

With the extinguishing of the idea of jurisdiction, its corollaries, such as the prohibitions on dualism and on working nonunion, disappear. So also do such prohibitions as working below union scale, since there is, of course, no union scale applicable outside individual shops.

Introvert industrial unionism has a further characteristic worthy of note. This consists of a tendency to regulate, in most minute detail, the relationships within a plant. Having little concern with general industrial conditions, it naturally turns its eyes inward and fashions rules for plant life often too inelastic for the successful conduct of any human relationship. In some of the enormous locals of the C.I.O., one of which has 80,000 odd members, this tendency has given rise to a good deal of trouble; so much so that general officers of the C.I.O. have been known to remark that large locals are something of a headache. How such a headache can be generated can be readily seen by considering that in one plant there was at one time an accumulation of over 3,000 grievances pending.

The introvert form has, however, flexibility in other directions. It is much more adaptable to the conditions of any single employer than are the other forms of unionism. It thus has a tendency to permit the smaller employer to exist where the extrovert form might threaten his existence. A pressure exists in the labor field toward adoption of the standards set by those concerns which can afford to pay higher wages and grant better working conditions, which are, generally speaking, the larger companies. In the extrovert field, this pressure fixes upon high rates and condi-

tions and those high rates cannot generally be varied to accommodate individual employers without destroying the entire structure. Introvert unionism, while it is subject to the same pressure and tends toward the same high levels, is not under the organizational necessity of maintaining uniformity and in most instances does adjust its contracts to fit the particular employer.

Still another feature of the introvert form which deserves consideration is the organic looseness which attaches to unions whose units are formed upon the elective principle. This can best be seen by comparing the central organizations of the A.F. of L., which still has a large extrovert interest with like bodies in the C.I.O., which is chiefly introvert. The central trades and labor councils of the former are likely to be chiefly concerned with business of a strictly union complexion, such as jurisdictional problems, mutual-assistance problems, but the industrial union councils of the C.I.O. will lean more toward matters of a legislative and political complexion. Also it will be noted, that the C.I.O. is much more forward in dealing with matters upon a legislative plane, often matters which concern its membership as such in a very indirect way. These phenomena result from the fact that in the introvert form the important institution is the bargaining unit, and it is the general organization which must justify its existence; whereas in the extrovert form the general organization is self-justifying and need not look beyond strictly union business to assure its continuance.

By way of generalization it may be said of introvert industrial unionism that it fitted into the pattern of American life in two major respects:

1. It subordinates the concepts of class consciousness and the idea of the general economic struggle to the practical adjustment of every day living and working conditions, which, though rooted in man's economic necessity to labor, are not essentially economic but are part of the human frictions engendered by any cooperative effort.

2. It tends to perpetuate rather than to destroy competition, while checking the worst effects of competition upon those who must labor.

Can introvert industrial unionism ever be developed into extrovert industrial unionism? That is unlikely, for extroversion would require the concurrence of too many human wills for too long a period. Such unanimity of free will is not to be expected in the absence of extreme and pointed pressures such as have created the extrovert unions of today. Given a stagnant economy, extroversion may take root, but as the American industrial scene now presents itself, that event is morally impossible so long as the right of choice is left intact.

This leaves us with the question: Can the extrovert forms in the tenure field be harmonized with the principle of choice so as to permit a reasonable resolution of conflicts? Organizationally, the answer is clearly, "No." It may, however, be possible to find an answer by some non-organizational method. This problem we suggest but leave unanswered partly because the two methods which appear to be possible are not wholly free of difficulty and partly because at this time the matter is not ripe for discussion. Involved in the matter is a reexamination of the antitrust laws in their application to labor and labor-industry combinations which can better be undertaken at a time when there is greater public knowledge of the institutions which underlie modern labor relations.

APPENDIX

TABLE I
SOME CHARACTERISTICS OF UNION TYPES

Characteristic	Casual craft (traditional and current)	Tenure craft (traditional)	Extrovert industrial (traditional)	Introvert industrial (current)
Typical unions found in.....	Building trades, stevedoring, etc.	Printing trades, etc.	Coal mining, etc.	General manufacturing and commerce
Organising principle.....	Monopoly—craftsmen and contractors	Monopoly—craftsmen and employers	Monopoly—employers	Election of employees
Corporate limits.....	Labor-market area	Labor-market area	Product market competitors	Group subject to homogeneous working conditions
Jurisdiction.....	All work proper to craft	All work proper to craft	Employees whose rates and terms affect selling price	As conferred by employees—exclusive when conferred
Dualism.....	Prohibited	Prohibited	Prohibited	Not significant
Working nonunion.....	Prohibited	Prohibited	Union-shop provision sufficient	Not significant
Wage base.....	Area scale	Area scale	Competitive parity	Community parity; intra-plant equity
Contract form.....	Union principal—multiple employer (usually)	Union principal—multiple employer (usually)	Union principal—multiple employer (usually)	Employee principal—single employer
Job discipline.....	Employer relies on union	Varies: later trend to employer or subject to arbitrator	Employer or arbitrator	Employer or arbitrator
Attitude to nonmembers.....	Must require membership or exclude from trade	Must require membership or exclude from trade	Must require membership or exclude from shop	Membership in union unnecessary
Federation (cross-craft cross-industry).....	Necessary save in unusual cases	Not necessary but helpful	Not necessary but helpful	Not significant
Affiliation (isotrade or iscindus trial; employees of one employer)	Necessary	Necessary	Necessary	Not significant
Contract substance, items emphasized.	Wages, organisational items, allowable stints	Wages, organisational items, grievances, seniority, other working conditions, allowable stints	Wages and working conditions affecting prices, organisational items generally assumed	Working conditions, grievances, seniority, internal relationship of wage rates
Items subordinated or absent.....	Grievances, seniority		Working conditions not affecting prices; seniority	Level of wages as compared with competing shops or like occupations elsewhere

TABLE II
THE CLOSED SHOP AND RELATED ARRANGEMENTS

Organisational provision	Casual craft (traditional and current)	Tenure craft (traditional)	Extrovert industrial (traditional)	Introvert industrial (current)
Closed shop.....	Necessary	Necessary	Unnecessary	Incompatible
Closed shop plus closed union.....	Justifiable	Justifiable	Not justifiable	Not justifiable
Union shop.....	Insufficient	Insufficient	Necessary	Incompatible
Preferential hiring.....	Insufficient	Insufficient	Question of fact	Question of fact
Service charge and nominal membership shops..	Incompatible*	Incompatible*	Incompatible*	Justifiable
Proportional union shop..	Insufficient	Insufficient	Justifiable	Incompatible
Maintenance of membership shop.....	Insufficient	Insufficient	Justifiable	Incompatible

* The "working card charge" is questionable.

DATE OF ISSUE
1 JUL 1979

This book must be returned
within 3, 7, 14 days of its issue. A
fine of ONE ANNA per day will
be charged if the book is overdue.
